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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 113

MANDASK COMPANIA DE VAPORES, S.A.,
Petitioner,

against

FEDERAZIONE ITALIANA DEI CONSORZI AGRARI, *et al.,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWIN LONGCOPE,
DAVID C. WOOD,
Counsels for Petitioner,
26 Broadway,
New York, N. Y. 10004.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Questions Presented	4
Statement of the Case	6
Reasons for Granting the Writ	10
1. The decision of the Court of Appeals is in conflict with its prior decisions, the decisions of other circuits, and the decisions of the English courts	10
2. What eight judges are evenly divided on an issue that has gone through two trials and two appeals, the final decision of the Court of Appeals, in conflict with existing law should be reviewed in order to eliminate uncertainty in the law	17
3. There is no justification in law or in commercial practice for the ruling of the Circuit Court that a foreign vessel owner is not entitled to rely upon compliance with classification society requirements but must also comply with United States Coast Guard requirements	21
4. The Court of Appeals was not warranted in affirming the District Court decision as to lack of due diligence which was predicated upon a clearly erroneous and unsuported finding that the vessel was constructed of brittle steel	21
5. In rejecting the right of the vessel owner to rely upon the classification society requirements in meeting the test of due diligence, the Court of Appeals has effectively negated the statutory exemption of COGSA and the limitation of Liability Act and forced upon the vessel owner an insurer's liability	24
Conclusion	29

Table of Authorities

PAGE

CASES CITED:

Capital Transp. Co. v. *Cambria Steel Co.*, 249 U.S. 334 (1919) 27

Coryell v. *Phipps (The Seminole)*, 317 U.S. 406 (1943) 25

Craig v. *Continental Ins. Co.*, 141 U.S. 638, 646 (1891) 25

The Floridian, 83 F. 2d 949, 951 (2d Cir. 1936)... 12

Hampton Roads Carriers, Inc. v. *Allied Chemical Corp.*, 329 Fed. 387, 390, 392 (4th 1964)..... 12

Ionian Steamship Co. v. *United Distillers*, 236 F.2d 78, 83-84 (5th Cir. 1956) 15

McAllister v. *United States*, 348 U.S. 19, 20 (1954) 21, 22

Mahnich v. *Southern S.S. Co.*, 321 U.S. 96 (1944).. 28

Michalic v. *Cleveland Tankers, Inc.*, 346 U.S. 325 (1960) 28

Mitchell v. *Trawler Racer, Inc.*, 362 U.S. 539, 559 (1960) 13, 28

Peter Paul, Inc. v. *The M. S. Christer Salen*, 152 F.Supp, 410 (S.D.N.Y. 1957); aff'd, 258 F.2d 901 (2d Cir. 1958) 11, 12, 23, 24

Petition of Kinsman Transit Company 27

The Point Chico, 122 F.2d 1, 4 (5th Cir. 1941) 13

Reed v. *S.S. Yaka*, 373 U.S. 410 (1963) 28

PAGE

Seas Shipping Co. v. *Sieracki*, 328 U. S. 85 (1946) . 28

States Steamship Company v. *United States*, 259 F.2d 458, 463-468 (9th Cir. 1957-1958) 16, 28

The Zarembo, 448 F.Supp. 915, 917 (E.D.N.Y. 1942); *aff'd (sub nomine Balfour Guthrie & Co.* v. *American West African Line*, 136 F.2d 320 (2d Cir. 1943)) 12

Union of India v. *N.V. Reederij Amsterdam* (1963), Vol. 2 Lloyd's List Law Reports 223.. 13, 24

W. R. Grace & Co. v. *Charleston Lighterage & Transfer Co.*, 193 F.2d 539 (4th Cir. 1952)..... 16, 28

Statutes Cited

28 U.S.C. § 1254(1) 2

Federal Rules of Civil Procedure, Rule 52(a) 22

The Carriage of Goods by Sea Act (COGSA), 49 Stat. 1210, 46 U.S.C. 1304(i), (2)(b)(p)(q) 3, 4, 10n

The Fire Statute (R.S. 4282, 46 U.S.C. 182) 3

The Limitation of Liability Act (R.S. § 4283, 46 U.S.C. 183(a) 3

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Mandask Compania De Vapores, S.A., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on January 16, 1968.

Opinions Below

This case has been twice tried and twice appealed. The opinion of the United States District Court for the Southern District of New York in the first trial, denying exoneration but granting to petitioner limitation of liability is reported at 223 F.Supp. 206 (S.D.N.Y. 1964), at 1965 A.M.C. 928 and is reprinted in the appendix filed herewith (A1-A15; R. 1668-1687).

On appeal to the United States Court of Appeals for the Second Circuit, the Court of Appeals reversed the District Court, expressing the view that the petitioner should have been exonerated. The opinion of the Court of Appeals is reported at 342 F.2d 215 (2d Cir. 1965), at 1965 A.M.C. 921, and is reprinted in the appendix filed herewith (A16-A20; R. 1694-1697). Since the trial judge in the District Court (Honorable Archie O. Dawson) had died before this appeal was decided the Court of Appeals remanded the case to the District Court for re-trial.

On a second trial before the United States District Court for the Southern District of New York, the District Court held that petitioner was not entitled to exoneration from or limitation of liability. This second opinion of the District Court is unreported but is reprinted in the appendix filed herewith (A20-A38).

On a second appeal to the Court of Appeals for the Second Circuit this second opinion of the District Court was affirmed by the Court of Appeals, by a different panel than heard and decided the first appeal. The opinion of the Court of Appeals on the second appeal is reported at 388 F.2d 434 (2d Cir. 1968) and is reprinted in the appendix filed herewith (A40-A49; R. 1784-1795). A petition for rehearing was denied by the Court of Appeals in an opinion which is unreported but is reprinted in the appendix hereto (A50; R. 1833).

Jurisdiction

The second judgment of the United States Court of Appeals for the Second Circuit was entered on January 16, 1968 (A40-A49; R. 1784-1795). The petitioner filed a timely petition for rehearing, which was denied by the Court of Appeals on February 20, 1968 (A50; R. 1833). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The statutory provisions involved on this petition are:

1. The Fire Statute (R.S. § 4282, 46 U.S.C. 182):

> "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

2. The Limitation of Liability Act (R.S. § 4283, 46 U.S.C. 183(a)):

> "(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

3. The Carriage of Goods by Sea Act (COGSA), (49 Stat. 1210, 46 U.S.C. 1304 (1), (2) (b) (p) (q)):

> "(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or dam-

age has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

UNCONTROLLABLE CAUSES OF LOSS

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * *

"(b) Fire, unless caused by the actual fault or privity of the carrier;

* * *

"(p) Latent defects not discoverable by due diligence; and

"(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

Questions Presented

In meeting the test of due diligence to make a vessel seaworthy under COGSA is a vessel owner not to be entitled to rely upon the fact that immediately prior to the disaster in suit the vessel received extensive repairs, made at considerable cost, by a reputable shipyard, pursuant to the recommendations of, and with the supervision and approval of the American Bureau of Shipping, and which resulted in granting highest classification to the vessel?

In fixing the standard of due diligence to be applied in cases under COGSA should the Court of Appeals be

permitted to reject the testimony of experts of a world renowned classification society in favor of its own expertise, where prior decisions of the same court, of the courts of other circuits, and the courts of England, have upheld the right of the vessel owner to rely upon compliance with the requirements of the classification society?

Where, on two trials and appeals therefrom, the eight sitting judges are evenly divided on the question as to what constitutes the standard of due diligence to be applied in cases under the COGSA and the second and final decision of the Court of Appeals is in conflict with its own prior decisions, the decisions of other circuits, and the decisions of the English courts, should not the decision of the Court of Appeals be reviewed by this Court in the interest of establishing uniformity in the applicable law?

In construing the standard of due diligence to be applied to a foreign flag vessel under COGSA, shall the Court of Appeals, in denying to an owner the right to rely upon compliance with classification society requirements, require that the vessel owner must also meet United States Coast Guard requirements, notwithstanding the flag of the vessel?

Where the decision of the District Court that the vessel owner was lacking in due diligence to make the vessel seaworthy is predicated upon an erroneous, unsupported finding that the vessel was "presumably" built of brittle steel, may the Court of Appeals, nevertheless, be permitted to affirm by dismissing objection to this unsupported finding upon the ground, in substance, that the District Court did not mean what it said?

Should this Court permit to stand a decision of the Court of Appeals which, in rejecting compliance with classification society requirements as meeting the test of due diligence would effectually negate the exemptions of COGSA and the Limitation of Liability Act and impose upon the vessel owner an insurer's liability?

Statement of the Case

These proceedings arise out of the loss of the *Perama*, a tank vessel of Panamanian registry, following upon a fire and explosions which occurred while the vessel lay to in the Gulf of Mexico, on March 18, 1957.

The *Perama* had been purchased by the petitioner in late 1956, after having been laid up by her previous owners for more than a year (R. 489-490). The vessel had been built in 1936 as a riveted vessel (A 49). Prior to purchase, petitioner requested the American Bureau of Shipping, with which the vessel had been classed, to make a thorough inspection to determine whether the vessel could be placed in a condition to be accepted for classification (R. 490, 598, 1029-1034). Following extensive surveys and inspections, petitioner was advised by the American Bureau of Shipping that the vessel could be classed if its recommendations were followed (R. 493-494). American Bureau of Shipping personnel drew up the specifications and plans for the repairs recommended by it, made daily inspections of the repairs as they progressed, and tested, approved and certified the *Perama* as seaworthy and fit to retain her class for the next four years, upon completion of the repairs in mid-January, 1957 (R. 494-496, 514-517). The repairs cost almost $1,000,000 and required 2½ months to be completed by the reputable Alabama Drydock and Shipbuilding Company (Plaintiff's Ex. 58).

The *Perama* then made one loaded transatlantic winter voyage to England and returned to Todd Shipyard at New Orleans for minor voyage repairs (R. 180-182, Plaintiff's Ex. 2). She then loaded the soybean oil cargo here involved at Baton Rouge (A 41). Respondents' surveyors made detailed examinations of the *Perama's* hull before and after the voyage repairs and loading, and approved her for the intended voyage (R. 53-54, 727-729, 743).

The *Perama* departed Baton Rouge on March 15, 1957 and about 0130 on March 18, 1957 lay to in the calm waters of the Gulf of Mexico, with temperature of 71°F., while repairs to one of the vessel's pumps were being made in the engine room (A 41). At that time fire broke out in the after cofferdam and pump room. The fire persisted until there occurred at 0315 an explosion which violently shook the stern section of the vessel (R. 263-265). Coincident with the explosion, a number of breaches occurred in the ship's bulkheads in and around the vicinity of the port fuel tank, where the explosion apparently occurred (A 41-A 42). Breaches were seen in the bulkheads of the fuel tank, in the sides of the ship below the waterline in the engine room, in the forward bulkhead of the engine room, and in the hull and after bulkhead in the pump room (R. 275-276, 293-299, 314-315). Oil and water poured violently through these breaches and from the ship's bottom, to such an extent that all engine room pumps, working at full speed, could not control the constantly rising water which soon rendered the pumps inoperative (R. 316-319, 277-279). A cargo pipe in the cofferdam was also fractured by the explosion (R. 430-434). 25 minutes after the explosion the engine room auxiliaries were submerged and the *Perama* was without electricity (R. 264). Within less than 2 hours after the explosion, the Perama's freeboard aft decreased from 7 feet to only 1 foot (R. 165). 13 hours afterward she sank, stern first and intact, while an attempt was made to tow her (R. 265).

On July 19, 1957, the owners of the soybean cargo on board the *Perama* at the time of her sinking, respondents herein, brought suit against petitioner in the United States District Court for the Southern District of New York to recover the value of said cargo.

Petitioner pleaded in defense to the said action that the loss was caused by the fires and resulting explosions, that

it had exercised due diligence to make the vessel seaworthy and was therefore entitled to exoneration under the Fire Statute and the Carriage of Goods by Sea Act or, alternatively, to limitation of liability under the Limitation of Liability Act.

The action came on for trial in the District Court before The Honorable the late Archie O. Dawson. The trial resulted in an opinion by Judge Dawson, entered on June 11, 1964 holding that petitioner was liable for loss of the cargo, but was entitled to limitation of liability.

On appeal to the Court of Appeals it reversed the decision of Judge Dawson and remanded the case for a new trial, Judge Dawson having died in the interim. In remanding the case the Court of Appeals stated (A 19):

> "In his discussion of limitation of liability Judge Dawson said:
>
> > 'The loss of the cargo does not seem to have been a matter which was occasioned by a default of the owner or by a lack of care for which it may personally be charged.'
>
> It is difficult to explain how Judge Dawson could have reached this conclusion and yet held the owner liable for the loss, unless he adopted the erroneous view that the owner was, apart from the fire exception, an insurer of the ship's safety and unable to defend on the ground of due diligence."
>
> • • • •
>
> "It is clear that Judge Dawson, preoccupied with the issue of fire, overlooked the fact that due diligence was an available defense to the charge of unseaworthiness. Thus he committed the error of finding that there was liability on the owner for the loss of the cargo and, at the same time, that the owner was entitled to limitation of liability by reason of due diligence of a character which, it would appear, constituted a complete defense on the issue of liability."

> "We perceive no way of correcting the errors and of resolving the inconsistencies except by remand for a new trial."

A second trial was had before The Honorable Thomas F. Croake, who, in an opinion filed December 21, 1966, held that petitioner was liable and was not entitled to limitation. He concluded that petitioner had not met the test of due diligence in relying upon compliance with classification society requirements. His conclusion was predicated entirely upon the finding that the *Perama's* hull was one . . .

> ". . . whose pre-war plating was presumably of pre-war sensitivity and susceptibility to brittle fracture . . ." (A 31).

He therefore concluded that the vessel sank because of fractures in her brittle steel (A 31), resulting from the welding of new steel plates to the brittle steel in the vessel's original plating; that the vessel was therefore unseaworthy and that petitioner had failed to use due diligence in not testing for susceptibility to brittle fractures before the plate replacements were made (A 30-31-33-45-46). Further, Judge Croake held that petitioner was not entitled to limit its liability because it was privy to the cause of the sinking, through the presence on board the vessel during the reactivation repairs of two independent surveyors employed by petitioner, and occasional visits by its president (A 33).

In actual fact there was no evidence in the record that there was brittle steel in the *Perama's* hull plating; that finding was entirely a presumption by the trial judge.

The Court of Appeals, in affirming Judge Croake's decision, avoided Judge Croake's clearly erroneous finding by saying, in substance, that he really didn't mean what he said (A 45-46) and that anyway brittle steel was not an important point in the case (A 45-46)—this notwithstanding the fact that the finding of unseaworthiness rested upon welding to presumptively brittle steel. The Court of Ap-

peals went further to say that this method of welding new plates to brittle steel was "dangerous" (A. 48), and that in the exercise of due diligence petitioner should have tested the *Perama's* original plating to ascertain whether it was brittle.

Thus, the decision of Judge Croake, and of the Court of Appeals, rested upon an erroneous finding, for which there was no supporting evidence, *i.e.* that the *Perama's* hull plating was brittle steel, which resulted in fractures that caused the vessel to sink.

In holding that petitioner was not entitled to rely upon compliance with the classification society's requirements the Court of Appeals stated that to meet the test of due diligence the reactivation repairs should have complied with United States Coast Guard requirements.

A petition to the Court of Appeals for rehearing having been denied, this petition for a writ of certiorari ensued.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with its prior decisions, the decisions of other circuits, and the decisions of the English courts.

The decision below ruled that *Perama's* owner failed to exercise "due diligence" to make her seaworthy within the meaning of COGSA [1] (A 40-A 49). The court reasoned that the vessel was unseaworthy due to improper repairs and the owner was liable, although the repair yard was a highly reputable one and repairs were conducted strictly in accordance with the recommendations and directions, and under the supervision of the American Bureau of Shipping (A 40-A 49). The court thus ruled that a vessel owner cannot satisfy the "due diligence" requirements

[1] 46 U.S.C.A. §1304(1).

of COGSA by relying upon the expertise of the American Bureau of Shipping, and complying with their recommendations and instructions. The standard of technical knowledge and expertise imposed on the shipowner by this decision is greater than any heretofore known. Such a determination is in direct conflict with the decisions of other panels in the same circuit, as well as other circuits, and the highest court in Great Britain.

The decision of the Court of Appeals is in direct contradiction to the decision of the same court, although by a different panel, in *Peter Paul Inc.* v. *Rederi, A/B Pulp*[2], a case that is on all fours with the present case, and in which it was held that a vessel owner has met the test of due diligence in relying upon the expertise of the vessel's classification society. In *Peter Paul* the vessel *Christer Salen* broke in two, allegedly because of a brittle fracture, and the failure to be equipped with "crack arresters" (the very same fault ascribed to *Perama* in this case). The cargo interests in the *Peter Paul* case (as the respondents in this case) claimed that the vessel owner could not delegate its authority or duty to exercise due diligence, and that it could not rely upon the recommendations and opinions of the vessel's classification society, in that case Lloyds. Judge McGohey held that the owner could rely upon Lloyds' recommendations against installing crack arresters and was entitled to exoneration:[3]

> "*The libellants further contend that since the shipowner may not delegate its duty to exercise due diligence, the reliance on Lloyds is not enough to exempt it from liability.* The argument is that since the owner itself knew or is charged with knowing all of the data gathered in the United States, in light of that data, Lloyd's views to the contrary notwith-

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[2] 258 F.2d 901 (2nd Cir. 1958).

[3] *Peter Paul Inc.* v. *M. S. Christer Salen*, 152 F. Supp. 410, 416 (S.D.N.Y. 1957).

> standing, the owner in the exercise of due diligence should have ordered the installation of crack arresters when the vessel was being repaired in 1950. *This argument seems to me to read 'due diligence' out of the statute.* In view of the sharp difference of opinion between Lloyd's experts and some, though not all, American experts, *I think common prudence dictated that the owner rely on the judgment of those experts under whose supervision its vessel had been built and repaired and who regularly surveyed and passed it for classification* as a seaworthy vessel. * * *." (Emphasis ours)

The Court of Appeals, affirming Judge McGohey's views, stated:

> "Appellant's argument therefore comes down to the following propositions: that any owner of an all-welded ship who did not definitely know that his ship was not notch brittle was required at the earliest feasible time to outfit her with crack arresters. We think such a rule imposes too broad a standard of liability."[4]

It is significant that although the decision in *Peter Paul* was briefed and argued to the Court of Appeals in the present case the court has simply ignored that decision in its opinion in the present case and makes no mention of it whatever.

Other 2nd Circuit decisions exonerating vessel owners who relied upon the expertise of their vessels' classification societies are: *The Floridian,* 83 F. 2d 949, 951 (2nd Cir. 1936); *The Zarembo,* 44 F. Supp. 915, 917 (E.D. N.Y. 1942), aff'd (*sub nomine Balfour Guthrie & Co.* v. *American West African Line,* 136 F. 2d 320 (2d Cir. 1943)).

The Fourth Circuit likewise exonerated a vessel owner, in *Hampton Roads Carriers, Inc.* v. *Allied Chemical Corp.,*[5]

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[4] 258 F.2d 901, 905.

[5] 329 F.2d 387, 390-392 (4th Cir. 1964).

and ruled that the owner had exercised due diligence to make the vessel seaworthy when the vessel sank within 60 days after two surveys had been conducted on the vessel. One of the surveys disclosed fractures in the hull which were repaired at the surveyors' direction.

The Fifth Circuit, in *The Point Chico*,[6] held that a vessel owner had exercised "due diligence" to make his vessel seaworthy and was entitled to exoneration in a cargo damage suit, where the vessel owner relied upon the expertise of his vessel's classification society and its surveyor's approval of a chain locker, even though other experts contended that cargo damage could have been avoided if the chain locker had had a different drainage system.

This Court has often stressed the desirability of uniformity of interpretation of the same or similar documents and statutes regarding maritime matters in the courts of this country and the courts of England. Justice Frankfurter stated in *Mitchell* v. *Trawler Racer, Inc.*,[7] that considerations urging harmony of law for international carriage, especially between the United States and the United Kingdom, led to the enactment of COGSA.

The law in England is expressed in the recent decision of the House of Lords in *Union of India* v. *N.V. Reederij Amsterdam*,[8] wherein it was held that a vessel has met the test of due diligence in relying upon the recommendations of his classification society, in this instance Lloyds. In *Union of India*, the *Amstelslot* left Portland, Oregon with a cargo of wheat for India, shipped under a bill of lading incorporating the United States COGSA. Her reduction gear broke down 900 miles from Honolulu due to a crack, necessitating considerable delay and expense. Cargo

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[6] 122 F.2d 1, 3 (5th Cir. 1941).

[7] 362 U.S. 539, 559 (1960).

[8] [1963] Vol. 2 Lloyd's List Law Reports 223.

charged that the shipowner failed to exercise due diligence to make the ship seaworthy, as required by Section 3(1) of COGSA, the same claim that is made herein. The review, discussion and conclusions of the House of Lords are in marked contrast to the conclusions of the Court of Appeals in the present case.

The *Amstelslot* had been built under Lloyd's supervision in 1922 and remained classed with Lloyd's until the casualty then befell her in 1957. In 1956 she was turned over to the present owners and put through a two month overhaul during which her machinery was surveyed by a Lloyd's surveyor (p. 225) and by the owner's chief engineer superintendent (p. 233). Allegedly, during the 1933 installation of the reduction gear, certain parts were fitted too tightly, resulting in fatigue and fracture of the metal.

The House of Lords stated the issues to be whether, if the crack so occurred, this condition should have been observed during a proper inspection in 1956; and, if the crack did not so occur, whether it still should have been observed by a proper inspection in 1956 (pp. 225-226).

Both parties' contentions therein were essentially those raised regarding the *Perama's* Alabama repairs (pp. 226-227). Cargo had claimed that a number of extra precautions should have been taken to discover, or to have a better chance of discovering the crack (pp. 230, 231, 233, 235). Cargo relied, as respondents do in the *Perama*, upon expert witnesses who criticized the survey as being inadequate (p. 235).

The House of Lords held that it was not enough to say that taking those steps would have given a better chance of discovering the cracks (pp. 230, 232, 235). The question was whether the examination was of the type that a *prudent* owner should reasonably have made, and if the examination was carried out with *reasonable* skill, care and competence (pp. 230, 231, 234).

The further steps demanded by cargo would have taken considerable time and effort and *would have required a higher standard than the due diligence shown by the above facts to have been exercised by the owner* (pp. 232, 230, 235).

It would be impractical to make elaborate scientific tests for every defect which could possibly be present in everything covered by a survey (pp. 230-231, 235). There was no lack of care or skilled knowledge; the surveyors knew the methods available.

> "* * * What is said against them is that by deciding in effect that these methods were not appropriate to the sort of examination they were conducting, they made an error of judgment which a competent surveyor ought not to have made. Lack of due diligence is negligence; and what is in issue in this case is whether there was an error of judgment that amounted to professional negligence." (p. 235)

The House of Lords held that the owner was justified in relying upon its classification society's surveys and recommendations, and had exercised due diligence warranting exoneration within the meaning of COGSA. But in the present case petitioner, who acted upon the same reliance as did the owner in Union of India, has nevertheless been charged by the Court of Appeals with making "dangerous" repairs. If this decision stands, the desired uniformity in the interpretation of these important COGSA points between this country and England will be eliminated.

The decisions in other circuits cited by the Court of Appeals to support its conclusions regarding due diligence bear little relation to the *Perama* situation. For example, *Ionian Steamship Co. of Athens* v. *United Distillers*[9] is clearly distinguishable on its facts. The decision there rested upon the ground that the vessel was seriously overloaded.

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[9] 236 F.2d 78, 83-84 (5th Cir. 1956).

W. R. Grace & Co. v. *Charleston Lighterage & Transfer Co.*,[10] cited by the Court of Appeals (A 49) as authority for the proposition that petitioner had knowledge and privity as a matter of law is also factually distinguishable. In that case a wooden lighter loaded with cotton sank while under tow. No repairs had been made since the lighter was purchased three years before the sinking, and there was no proper inspection or upkeep. After the sinking a crack was discovered in the hull which was found to be soft and beginning to rot (pp. 542-543).

The Court of Appeals completely misconstrued (A 49) the Ninth Circuit's discussion of brittle fractures in *States Steamship Company* v. *United States*,[11] which supports petitioner's claims of due diligence. In that case, the *Pennsylvania*, an all-welded ship, built during World War II, sank with all hands in January in the Gulf of Alaska after radioing that she had suffered a fourteen foot side crack (pp. 459-460). The Court stated that the highest incidence of fractures occurs when the combination of low temperatures and heavy seas prevails. She had sustained a twenty-two foot deck crack on the preceding voyage due to the crack sensitiveness of the vessel in extremely cold weather. Because of this former crack, the vessel was shown to be crack sensitive which made her unseaworthy under conditions of extreme cold weather (p. 466). Despite this known propensity to fracture under such conditions, the *Pennsylvania* was sent on this mid-Winter North Pacific voyage where low temperatures, heavy seas, and unusual stresses would be encountered. The prior experience and resulting implications were within the knowledge of managerial employees (pp. 464-468). The vessel was held unseaworthy because of her known crack sensitive-

[10] 193 F.2d 539 (4th Cir. 1952).

[11] 259 F.2d 458 (9th Cir. 1957-58).

ness (pp. 473, 475). The Ninth Circuit, held that, under the circumstances, the owner had the obligation

> "* * * to direct that the ship be taken to her destination in Japan by a route through warmer waters where the likelihood of severe storms would have been less." (p. 468)

No liability would have attached and the owner would have exercised due diligence had it so directed the vessel on a route through warmer waters where the likelihood of storms would have been less.

The *Perama* had none of these normal requisites for initiating a single brittle fracture. She was not a welded vessel, did not have brittle steel, did not encounter heavy seas, and was not underway at the time of the casualty, which occurred in the calm, warm waters of the Gulf of Mexico (R. 1234, 1238-1242, A 41).

If the present decision is permitted to stand, the due diligence defence available to a vessel owner under COGSA is effectively eliminated and the uniformity of interpretation hitherto present in the various circuits of this country, and between this country and Great Britain is disrupted.

2. When eight judges are evenly divided on an issue that has gone through two trials and two appeals, the final decision of the Court of Appeals, in conflict with existing law should be reviewed in order to eliminate uncertainty in the law.

The *Perama* had been built to American Bureau of Shipping specifications, and had been classed with the Bureau at all times. The American Bureau of Shipping inspected the *Perama* before, during and after the repairs in question in this suit (R. 490, 494-496, 519-517, 598, 1029-1034). Specifications for the repairs drawn up by ABS involved the evaluation of the entire hull with all its com-

ponents and the making of any recommendations necessary to bring it up to ABS standards (R. 1370-1372). It was undenied that *Perama's* owner accepted, and complied with each and every recommendation (R. 495-499). ABS representatives were present during the entire repair period and all work done was examined and tested in accordance with ABS rules and found in seaworthy and satisfactory condition (R. 494-496, 514-517).

Eight judges have now considered these facts in the course of two trials and two appeals, and have split evenly on the issue of whether or not *Perama's* owner exercised "due diligence" to make her seaworthy. The first trial court found that recognized experts had been selected by the Owner to plan, supervise and carry out her repairs and refused to hold that the owner had failed to exercise due diligence with regard to seaworthiness (A 13-15) and stated:

> "* * *. While undoubtedly the Respondent as owner of the vessel, knew about the welding and approved it, *there was no proof that the loss of the vessel's cargo was done or occasioned by some default of which the owner was in privity for this would imply that the Respondent knew that such welding made the ship unseaworthy.* The rehabilitation of the vessel was done for Respondent at the Alabama Drydock & Shipbuilding Company where she underwent intensive survey by representatives of the American Bureau of Shipping to determine the repairs necessary to put the vessel back in class with the American Bureau of Shipping. The reconditioning and repairs cost in excess of $890,000.00. The repairs were supervised by an independent surveyor acting for the Respondent; by representatives of the American Bureau of Shipping and by the representative of Alabama Drydock & Shipbuilding Company. Following completion of the work the PERAMA was accepted in class as being seaworthy by the American Bureau of Shipping."
>
> * * *

> "In retrospect it would seem that the reconstruction of the vessel by welding of the new plates was a mistake. However, it was approved by recognized experts in the shipping industry at the time. *The loss of the cargo does not seem to have been a matter which was occasioned by a default of the owner or by a lack of care for which it may personally be charged.* There seems to be no reason why it should be unable to avail itself of the limitation of liability provided by Section 183. * * *." (pp. A 13-A 14) (Emphasis ours)

District Judge Dawson concluded that this entitled the Owner to Limitation of Liability.

An experienced admiralty appellate panel, consisting of Judges Lumbard, Waterman and Hays, determined that, based upon Judge Dawson's findings and conclusions, the petitioner should have been exonerated, as petitioner contended, rather than having been granted limitation of liability. However, since Judge Dawson was not then alive to correct his apparent error, the Court of Appeals remanded the matter for a new trial (A 19-A 20).

Judge Croake, who sat for the second trial, did not have the benefit of personally hearing any of the fact witnesses, but nevertheless, and in contradiction of Judge Dawson, found that the owner had failed to exercise due diligence and was entitled to neither exoneration nor limitation of liability (A 36-A 39). Judge Croake concluded that

> "* * * The owner has not shown that the repairs themselves were performed with the kind of diligence that would exonerate it from liability for the ensuing unseaworthiness. * * *" (A 33)

He did not explain what kind of diligence would warrant exoneration.

A second Court of Appeals panel, consisting of Judges Friendly, Kaufman and Anderson, affirmed Judge Croake's

opinion. The Court recognized that petitioner claimed to have exercised the due diligence required by COGSA to justify exoneration, and that

> "* * * it produced evidence to show that it had fully complied with the recommendations of the American Bureau of Shipping to make the vessel seaworthy and that it contracted to have the work done by a reputable shipyard, Alabama Shipyard & Dry Dock Company. * * *" (A 47)

It admitted that

> "There was evidence that the American Bureau of Shipping in its standards approves and accepts unlimited replacements of the plates in a riveted hull by welded plates. * * *" (A 48)

Although the undisputed evidence in the case showed that the repairs to the *Perama* fully complied with ABS standards the Court of Appeals nevertheless concluded:

> "* * * That this method of repair used so extensively in the *Perama* was dangerous was something the appellant knew or should have known." (A 48)

As noted above, *supra* (pp. 10-18), the last two decisions in this case are in plain conflict with the decisions of other panels in the same circuit, as well as being in conflict with the decisions of courts in other circuits as well as the highest court in England.

The confused state of the law resulting from the present decisions of the Court of Appeals with respect to the standard of "due diligence" imposed upon ship owners will wreak havoc not only on the shipping industry, but also upon marine insurers and shipbuilders. This is a matter of continuing legal and commercial importance, and certain to give rise to widespread litigation until the present decision as to what does constitute the standard of due diligence under COGSA is resolved by this Court.

3. There is no justification in law or in commercial practice for the ruling of the Circuit Court that a foreign vessel owner is not entitled to rely upon compliance with classification society requirements but must also comply with United States Coast Guard requirements.

In this case, the Court of Appeals based its conclusion that *Perama's* owner had not exercised "due diligence" to make her seaworthy, on the erroneous assumption that the United States Coast Guard would not have approved the repairs made on *Perama*. There was no evidence before the Court of any such Coast Guard regulation applying its requirements to foreign flag vessels such as the *Perama*. Until the present case no decisions of our Court have gone so far as to say that the standard of due diligence requires not only compliance with classification society requirements, but also with United States Coast Guard requirements. Moreover, assuming *arguendo* that the Coast Guard had such regulations, there is no basis in existing law to hold that such a regulation can be extended unilaterally to a foreign flag vessel, which, in such matters as this, is beyond the regulatory control of the United States Coast Guard.

4. The Court of Appeals was not warranted in affirming the District Court decision as to lack of due diligence which was predicated upon a clearly erroneous and unsupported finding that the vessel was constructed of brittle steel.

This Court, in *McAllister* v. *United States*,[12] stated that in reviewing the judgment of a trial court sitting without a jury in admiralty a court of appeals may not set aside the judgment below unless it is clearly erroneous,

[12] 348 U.S. 19, 20 (1954).

as under Rule 52(a) of the Federal Rules of Civil Procedure. In defining the Rule 52(a) standard, it stated:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

This Court obviously did not intend to remove all fact finding considerations from the courts of appeal, particularly where, as here, clear factual errors require and demand appellate review. The *McAllister* rule should be applied impartially. However, in this case, the Court of Appeals refused to look beyond Judge Croake's findings, and in effect extended the *McAllister* rule to eliminate reversal even when the lower court is in clear error.

Judge Croake's entire opinion was based upon the finding that the *Perama's* hull was one

> "* * * whose pre-war plating was *presumably* of pre-war sensitivity and susceptibility to brittle fracture * * *." (A-31).

He stressed the fact that she sank because of fractures in her brittle steel (A31), and found her unseaworthy because they must have been triggered by the Alabama repairs (A30-A31). Both Judge Croake and the Court of Appeals concluded that the *Perama's* original plating should have been tested for susceptibility to brittle fracture before the plate replacements were made (A30-A31, A33, A45, A46).

The evidence in this case was that the steel used in vessels prior to World War II was of the high manganese content required after the war to eliminate the rash of brittle failures due to the low manganese content steel used during World War II in vessel construction (R. 1238-1242). There was no basis whatsoever for the conclusion that ABS or Alabama should have been required to test the *Perama's* original steel for brittle sensitivity.

Both parties' experts agreed that, even had the *Perama's* original plating been of the low manganese, brittle-sensitive type, brittle fractures are not associated with the warm temperatures found in the pump room and engine of a vessel in the Gulf of Mexico (R. 1257, 1502-1503). This testimony was ignored as was the finding in *Peter Paul, supra,* based upon almost identical testimony by the same government expert, MacCutcheon, that even brittle steel of proven high carbon, low manganese content did not become notch brittle until the temperature dropped to 30°F. The temperature was 71° when the *Perama* casualty occurred.

The only precaution advocated in welded vessels known to be built of brittle steel was the installation of crack arrestors, to prevent the spreading of minor fractures. The riveted *Perama* was constructed of crack arrestors and each of her new steel strakes was admittedly a crack arrestor (R. 1309). Even had the *Perama* been built of proven brittle steel, what further steps would this Court require? Replacing of all her original steel? This Court has as yet set no such standard. The Court of Appeals' decision left the owners' responsibility in such a case to the imagination. Neither owners, builders, repairers, nor their underwriters can operate on a sound business basis under such circumstances.

Such reasoning indicated a clear misconception of the basic controversy before the Court of Appeals, for if the steel were not actually brittle, there was no basis whatever for petitioner's alleged lack of diligence. Its decision ignored this vital point and created a new theory of liability. The "*essence*" of Judge Croake's decision is said to be that replacement of plates by welding in the *Perama's* riveted hull

> "* * *, set up stresses within the hull between the fixed and rigid areas of welded plates and the less rigid riveted areas which resulted in cracking in

> various parts of the hull and the internal structures. Just when and where such stresses in the hull will produce cracks—whether near to or distant from the place of repair—cannot usually be determined, but the substitution of large areas in a riveted hull with welded plates is likely to cause cracks. * * *." (A 46)

Since his opinion contained no such theory or explanation, the Court of Appeals claimed that he

> "* * * in effect, found that this is what happened in the present case * * *." (A 46)

The evidence of what was observed, and the expert opinion, did not support this conclusion, as claimed (A46). Although both parties' naval architects testified that there was no connection between the extensive fractures seen in the *Perama's* pump and engine rooms coincident with the explosion and the Alabama repairs (R. 1476, 1434, 1480, 1482, 1498-1501), the Court of Appeals termed the method of repairing "dangerous" (A 48).

The requirement that petitioners had to test the *Perama's* original plates and prove the steel non-brittle was condemned by the same court in *Peter Paul, supra.*

The House of Lords expressed the same opinion in *Union of India, supra,* page 13.

5. In rejecting the right of the vessel owner to rely upon the classification society requirements in meeting the test of due diligence, the Court of Appeals has effectively negated the statutory exemption of COGSA and the Limitation of Liability Act and forced upon the vessel owner an insurer's liability.

The mere fact that a vessel is unseaworthy does not *ipso facto* make her owner liable for resulting cargo dam-

age. *Craig* v. *Continental Insurance Co.*[13]; *Coryell* v. *Phipps.*[14]

In the instant case, *Perama's* owner relied upon the judgment and expertise of those experts under whose supervision *Perama* had been built and repaired, and who passed her for classification as a seaworthy vessel (*supra*, pp. 6-7). The Court below, nevertheless, held that this was insufficient to satisfy the standard of "due diligence" under COGSA.

If a vessel owner who relies upon the recommendations, standards and work of his classification society cannot obtain exoneration, the defense of due diligence has been effectively eliminated from COGSA by this decision of the Court of Appeals. If petitioner could not rely upon ABS opinions that the *Perama's* plate replacements should be by welding, what other opinion could a diligent owner rely upon? The absence of any indicated alternative upon which an owner may rely places upon him an impossible burden of proving due diligence and a virtual denial of the statutory exemption.

In the present case the Court of Appeals, contrary to its own prior decisions upholding the right of the vessel owner to rely upon the recommendations of his classification society has gone further and charged that the method of repair ABS used in the *Perama* was "dangerous" and "something the appellant knew or should have known" (A 48). How could petitioner, or any owner of a vessel classed with ABS, or with any foreign classification society, be held to know that a method of repair which its ABS classification society designed, recommended, supervised and approved, and was carried out by a reputable shipyard was dangerous. The standard of technical knowledge and expertise imposed on the shipowner is greater than that imposed upon ABS

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[13] 141 U.S. 638, 646 (1891).

[14] 317 U.S. 406, 412 (1943).

and the shipyard. This Court has not yet imposed such a burden.

The reasoning of the Court of Appeals would require a shipowner to engage independent experts, if they could be found, who knew more about ship repair and construction than did ABS, or any other classification society in which the vessel was classed. Further complications would then arise as to the degree of diligence acceptable in choosing such an expert. Obviously, this approach would render any action taken by a vessel owner in repairing or modifying his vessel, and, indeed, in constructing his vessel, subject to judicial review. It would create indefiniteness and indecision as to the applicable standard of due diligence, and would be a fertile breeding ground for litigation.

No officer of petitioner participated in the reactivation repairs which were recommended, supervised and approved by the American Bureau of Shipping. Nine reputable independent surveyors acted as petitioner's liaison with ABS and the repair yard (R. 490, 598, 1029-1034). Petitioner's president visited the shipyard on several occasions during the two and one-half-month repair period, but merely accepted, without qualification, the recommendation of his classification society, presumably competent persons (R. 497-498). If their work was faulty, which is denied, petitioner is entitled to limitation of liability.

Judge Dawson on the first trial held that " * * * While undoubtedly the respondent as owner of the vessel, knew about the welding and approved it, there was no proof that the loss of the vessel's cargo was done or occasioned by some default of which the owner was in privity for this would imply that the respondent knew that such welding made the ship unseaworthy. * * *" (A 13). Based upon the same facts, and with no additional evidence regarding the repairs introduced at the second trial, the Court of Appeals stated that the *Perama* was sent to sea in an unseaworthy condition because of petitioner's lack of due diligence (A 49).

We have found no case in which repairs such as were here made to the *Perama,* were so carefully planned, executed and supervised by a vessel's classification society, were approved by responsible experts, and yet the owner was denied exoneration, much less limitation, of liability. Further, we have found no case in which an independent surveyor's presence during repairs rendered him sufficiently high in the managerial hierarchy to constitute privity, barring limitation of liability.

Supposedly, the responsibility for exercising due diligence could not be delegated to others (A 47). We assume that in so stating, the Court of Appeals is speaking of ABS and Alabama, as "others", and attributes a lack of due diligence to the vessel owner by implying that the petitioner or its independent surveyor knew more about the correctness of the repairs than the American Bureau of Shipping, which is obviously not correct. However, the primary and basic ingredient is missing. What conduct on their part barred the defense of due diligence? Did they take some negligent step which resulted in the *Perama's* sinking, or did they fail to take some required precaution.

This Court in *Capital Transportation Co.* v. *Cambria Steel Co.*,[15] observed:

> "* * *. We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners * * *."

Ship owners and their insurers are entitled to rely on the limitation of liability statute and the decisions applying it, as recently referred to in *Petition of Kinsman Transit Company.*[16]

The present decision also attempts to obtain stature by implying (A 49) that two other circuits would support its

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[15] 249 U.S. 334 (1919).

[16] 338 F.2d 708, 715 (2d Cir. 1964).

holding that petitioner had knowledge and privity as a matter of law. This conclusion illustrates the conflict in interpretation of the statute between this Second Circuit decision and that of the Ninth Circuit in *States Steamship Company* v. *United States*,[17] and the Fourth Circuit in *W. R. Grace & Co.* v. *Charleston Lighterage & Transfer Co.*[18]

This Court has adopted an increasingly liberal interpretation as to what constitutes unseaworthiness in connection with seamen and longshoremen injury cases. See *Mahnich* v. *Southern S.S. Co.*;[19] *Seas Shipping Co.* v. *Sieracki*;[20] *Mitchell* v. *Trawler Racer, Inc.*;[21] *Michalic* v. *Cleveland Tankers, Inc.*;[22] *and Reed* v. *S.S. Yaka*.[23] However, it has not yet applied this insurer type burden to cargo losses covered by COGSA. The vessel owner theoretically still has the right to exoneration upon showing the exercise of due diligence to prevent unseaworthiness, even though unseaworthiness may be found to exist. The Court of Appeals decision herein bridged this gap without Congressional or Supreme Court authorization, and applied the personal injury insurer's burden of seaworthiness to a COGSA situation.

Until these statutes are revised by Congress, or abrogated by this Court, some uniformity in their interpretation is essential. The present decision violates all precedents.

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[17] 259 F.2d 458 (9th Cir. 1958).

[18] 193 F.2d 539 (4th Cir. 1952).

[19] 321 U.S. 96 (1944).

[20] 328 U.S. 85 (1946).

[21] 362 U.S. 539 (1960).

[22] 364 U.S. 325 (1960).

[23] 373 U.S. 410 (1963).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWIN LONGCOPE,
DAVID C. WOOD,
Counsel for Petitioner.

May 17, 1968.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 113

MANDASK COMPANIA DE VAPORES, S.A.,
Petitioner,

against

FEDERAZIONE ITALIANA DEI CONSORZI AGRARI, ET AL.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID C. WOOD,
Attorney for Petitioner,
26 Broadway,
New York, N. Y. 10004.

INDEX

	PAGE
Opinion of Judge Dawson	A–1
Interlocutory Decree Signed by Judge Dawson	A–15
Court of Appeals Decision (March 3, 1965) (Judges Lumbard, Waterman and Hays)	A–16
Opinion of Judge Croake	A–20
Interlocutory Decree Signed by Judge Croake	A–39
Court of Appeals Decision (January 16, 1968) (Judges Friendly, Kaufman and Anderson)	A–40
Denial of Petition for Rehearing (February 20, 1968	A–50

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion of Judge Dawson

(R. 1668-1687)

DAWSON, D.J.:

This is a suit in admiralty to recover the value of a cargo of soybean oil which was lost when the Panamanian tankship *Perama* sank in the Gulf of Mexico on March 18, 1957, en route from Baton Rouge, Louisiana to Italy.

Many of the essential facts in connection with the litigation were stipulated by a pre-trial order filed on August 9, 1963. Thereafter a trial was held by the Court without a jury. Briefs and reply briefs have been filed.

The Court now renders its opinion and decision, which opinion shall constitute the findings of fact and conclusions of law of the Court.

The pre-trial order stipulated that libellant was the owner of the shipment in suit; that the bill of lading, a copy of which is annexed to the pre-trial order, was nego-

tiated by the shipper to the libellant; that the tankship *Perama* was owned and operated by the respondent; that the cargo in suit was loaded aboard the *Perama;* that the *Perama* departed from Baton Rouge, Louisiana, with libellant's cargo aboard, and that on March 18, 1957 the *Perama* sank and became a total loss with her cargo.

The stipulated facts establish a *prima facie* case entitling the cargo owner to recover, unless respondent can show that the cause of loss was excluded from the liability of the carrier by provisions of law.

The principal defense raised by respondent is that the loss in suit was excluded by the fire exception of *Cogsa;* 46 U. S. C. § 1304(2)(b), and the so-called "fire statute," 46 U.S.C. § 182.*

The facts shown at the trial established that the *Perama* was an old tanker built in 1936 for the American Oil Company. The respondent purchased the *Perama* some twenty years later from American Oil Company after the vessel had been laid up and had been inactive for considerable time at Jacksonville, Florida. Respondent put the *Perama* in the yard of the Alabama Drydock & Shipbuilding Company in Mobile, Alabama, for reconditioning, renewal and repairs. After completion of this work the *Perama* there-

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* Title 46, U. S. C., § 1304 provides in part:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from * * *

(b) Fire, unless caused by the actual fault or privity of the carrier."

Title 46, U. S. C., § 182 provides:

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

after sailed from Mobile, Alabama, on January, 18, 1957 and proceeded to Houston, Texas, from which port she sailed to England loaded with a cargo of gas oil, arriving there on February 11, 1957. The *Perama* returned from Thameshaven in ballast bound for New Orleans, Louisiana, where it arrived on March 9, 1957. Upon arrival at this port, respondent sent the *Perama to* Todd Shipyards Corporation, New Orleans Division, where further repairs were made. The vessel thereafter went from New Orleans to Port Allen, Louisiana, and Baton Rouge, Louisiana, with certain repairs being made during this voyage. At Baton Rouge, Louisiana, she loaded the cargo in suit, consisting of soybean oil.

The *Perama* departed from Baton Rouge on March 15, 1957, but was forced to anchor that morning in the Mississippi River for approximately two hours while repairs were being made on the steering gear. Two days later it was found that the *Perama's* main lubricating oil pump in the engine room was malfunctioning and as a result the ship's main engines were shut down. Attempts were made to repair this lubricating oil pump and these repair activities continued until the morning of March 18th.

About 1:30 A.M. on the morning of March 18th, while the ship was in the Gulf of Mexico, smoke and fire were observed in the area of the *Perama's* after pump room and after cofferdam. There was testimony that at the time the fire was first observed a sound was heard which resembled the sound of an explosion. Smoke and some flame was observed coming from the *Perama's* pump room and from her aft cofferdam. The fire pumps and other pumps in the engine room were started up. Fire hoses were played against the bulkheads of the aft cofferdam and the pump room and smothering foam and CO_2 were introduced into these two compartments. The log indicated the fire was out at 2:40 A.M.

The Chief Engineer entered the pump room and noted that the machinery was damaged, but noticed no leaks after the fire was out. Thereafter a second loud noise was heard, which was described as sounding like an explosion. This was at 3:15 A.M. This so-called explosion was not accompanied by or followed by any visible fire; no flames were seen and no smoke was seen. The cofferdam and pump room were reentered by the Chief Engineer who noticed that certain cargo pipes were fractured and extensive damage was found in the pump room, including cracks in the bulkheads between the center and port fuel tanks. Leakage of sea water into the compartment from below the floor plating was observed. A crack was observed in the hull of the engine room floor which sea water was entering. Various ineffectual attempts to control leakage were made but despite these efforts the water level in the engine room rose until all the machinery became inoperative and that compartment was abandoned. Distress messages were sent and by early morning two ships and Coast Guard planes were at the scene. An attempt was made by the cargo ship *Clairborne* to tow the *Perama* but the first line broke. Thereafter a second chain line was used and the vessel was towed for a short while. Shortly before 3:40 A.M. the generator supplying the ship with light and power for the auxiliary machinery was flooded and ceased to function. The crew was removed in the life ships.

Photographs taken during the salvage effort, both from the Coast Guard aircraft and the *Clairborne*, which were introduced in evidence, show that during the night the *Perama* settled until her decks amidships were nearly awash. The vessel appeared to be going down on close to an even keel. The sea was calm. The vessel remained afloat until mid-afternoon of March 18th when she sank stern first and became a total loss with her cargo. The log states the time of sinking as 4:31 P.M.

Opinion of Judge Dawson

It was obvious from the testimony and exhibits that the immediate cause of the sinking of the ship was the flooding of the ship, resulting from the ingress of sea water through cracks in the hull. Whether this condition was caused by fire was the principal issue tried.

The Court, after hearing the testimony and examining the exhibits, reaches the conclusion and finds as a fact that the sinking of the vessel was not occasioned by fire. That there was a fire undoubtedly is true. That thereafter the ship sank is also true. Respondent's contention that it sank due to the fire is a typical example of the easy logical fallacy of *post hoc, propter hoc.*

The evidence indicates that the fire was in the pump room and the aft cofferdam. There is no evidence that this fire resulted in breaking the hull of the ship. The fire was extinguished. Thereafter a sound was heard, as though that of a second explosion, but no fire or flame resulted at that time. It is libellant's contention that the so-called second "explosion" was a fracturing of the plates of the vessel occasioned by the fact that in the reconstruction of the vessel steel was welded to the former riveted plating and this welded plating became susceptible to brittle fracture. It is respondent's contention that the second "explosion" was occasioned by the fire and that this second "explosion" resulted in causing cracks in the ship's hull. Nobody actually saw the result of this so-called "explosion" so most of the testimony was in the nature of conjecture. It is necessary to reconstruct what actually happened from the testimony of persons who were on the ship and from the testimony of expert witnesses.

The *Perama* originally had an all-riveted shell. When the ship was reconstructed at the Alabama Drydock & Shipbuilding Company yard at Mobile, Alabama, large areas of welded plating were welded to existing plating. The welding at Mobile incorporated the old plates as well as the new into large areas of welded steel, replacing the wasted areas

of the *Perama's* shell, deck and bulkheads. Libellant contends that the cracks in the *Perama's* hull were the immediate cause of the sinking and that these cracks were the result of brittle fractures, and that the brittle fractures were not caused by fire.

It should be pointed out that the burden of proof is upon the respondent to show that the loss of the cargo was caused by fire. To establish its claim to exoneration by virtue of the fire exemption of the Carriage of Goods by Sea Act or the Fire Statute, it must establish that the loss of the cargo was due to fire. *Bank Line* v. *Porter*, 25 F. 2d 834 (4th Cir. 1928), *cert. denied*, 278 U.S. 623. Has the respondent met that burden of proof?

In the first place it is clear beyond peradventure of doubt that the loss was due to the ingress of sea water caused by cracking of the hull.* Was that cracking of the hull caused by fire? The testimony of the Chief Engineer was that after the first "explosion" and the extinguishment of the fire he entered the pump room and noticed that the machinery was damaged but noticed no leaks in the hull. After the so-called second "explosion" the Chief Officer entered the cofferdam and pump room. He noticed at that time that the ten inch cargo suction pump serving the port wing tanks was fractured. He also found extensive dam-

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* The testimony of the master of the ship who was present during the entire time of the so-called "explosions" and the sinking of the ship was instructive. He testified (p. 113):

"The Court: You don't know what caused the cracks in the skin of the ship either, do you?

The Witness: No, sir.

The Court: Apparently what caused the ship to sink was that the skin of the ship cracked and the water came in.

The Witness: Yes, sir.

The Court: If the crack had merely been in the deck, the ship would not have sunk, or if you had merely had the fire it would not have sunk apparently?

The Witness: No, sir."

age in the pump room, including cracks in the bulkheads between the center and port fuel tanks and noticed seepage of water from the floor plating, indicating cracks in the hull near the ship's bottom In other words, no leaks were noted in the hull at the time of the fire. The leaks were noticed after the so-called second "explosion".

After the first so-called "explosion" and fire the engine room was occupied by the engine room personnel, none of whom observed cracks in the hull of the ship. After the second so-called "explosion" the personnel in the engine room observed cracks in the hull of the ship and the bulkheads between the engine room and the port fuel tank and a great inrush of water.

The master testified that after the second so-called "explosion" he observed a crack across the deck near the numbers 5 and 6 tanks, which had no possible relation to the fire or explosion in the cofferdam or pump room area. This crack went across two strakes of new deck plating installed at the Alabama Shipyard & Drydock Company a few months before. Photographs introduced in evidence also indicated hull cracks forward which were not related to the claimed fire and explosion in the cofferdam and pump room.

Photographs introduced in evidence showed that the vessel sank in calm water on a comparatively even keel until the last moment of her sinking. Expert testimony was given that the ship could not have sunk on a comparatively even keel unless her hull opened extensively to the sea at a great distance forward of the cofferdam, pump room and engine room area. In other words, the hull cracks were not solely in the area of the cofferdam, pump room and engine room but were also forward.

That there was a fire in the pump room and aft cofferdam was undisputed. It may have been occasioned by a cracking of the pipes in the pump room and in the tunnel leading under the aft cofferdam, with a discharge of fuel oil into that area which caught on fire.

The theory of the respondent for the second explosion and consequent sinking of the ship was that this fire in the pump room heated up the bulkheads of the pump room which were the bulkheads of the adjoining fuel tanks and that this caused an explosion in the fuel tanks with the consequent cracking of the hull of the ship. This is plausible theory. It was effectively demolished, however, by the testimony of Mr. Prussing, an expert on fuel oil storage and explosions. Mr. Prussing pointed out that if there had been an explosion in the fuel oil tank the force of the explosion would have been felt not merely in the hull of the ship but also in the other sides of the fuel oil tank, particularly the deck and the bulkheads, and that there could have been no such explosion which would have cracked the hull of the ship without distortion in other parts of the structure surrounding the fuel oil tanks. This would seem obvious even to a layman. An explosion in a confined area does not go in one direction. An explosion in the fuel oil tank which cracked the hull of the ship might be assumed to also crack the deck of the ship, or the side bulkheads of the compartment, all of which are built of steel of less thickness than the hull. However, the undisputed evidence was that there was no crack in the deck of the ship which was the upper part of the fuel oil bunker. The photographs taken at the time of the sinking show no such crack. There apparently was no distortion (a bulging outward) of the deck or of the side bulkheads of the fuel oil compartment. This leads the Court to conclude, as a matter of fact, that the cracks in the hull of the ship were not occasioned by an explosion in the fuel oil tank caused by fire.

We now come to the next problem which is this: What caused the cracks in the hull of the ship?

It must be remembered that the *Perama* was an old vessel at the time of the sinking. It had been built in 1936. It was taken out of service and laid up in Jacksonville,

Florida, in the early part of 1954 in an excessively rusted and deteriorated condition because the owner was unwilling to make the repairs and renewals necessary to meet the requirements of the Classification Society. It continued to be laid up for approximately two years. While the vessel was in a laid up condition prior to her purchase by the respondent, the hull of the vessel had been drilled under the supervision of the American Bureau of Shipping on a number of occasions. These drillings showed numerous wasted places in the *Perama's* hull plating. The *Perama* was taken by its new owner to the Alabama Shipbuilding and Drydock Company at Mobile, Alabama, where various repairs were effected. Numerous platings on both sides of the vessel were made. A number of additional plates were renewed; the bulkheads between the vessel's cargo tanks were partially renewed. These new plates were put in and the deteriorated plates were repaired by the welding of plating to the old plating. Originally the vessel was a riveted vessel but after the repairs it was a riveted vessel with plates welded to the old riveted portion.

When the *Perama* was built in 1936, little was known about the propensity of ship plating to crack in a brittle fashion at an operating temperature such as 70° Fahrenheit during low stress. During World War II, when ships were built in large numbers by welding plate, rather than riveting it, serious cracks developed in a great number of the welded ships and an investigation into the causes of these cracks led to the discovery of the fact that ship's plating of the composition formerly employed in riveted ships was likely to develop brittle fracture at low stress under ordinary operating temperatures when incorporated into welded structures on ships or subjected to stress magnification by alterations in a vessel's structural design.

The welding of untested plating, manufactured in 1936 or before, to the new plates installed in the *Perama* by the Alabama Shipbuilding and Drydock Company created a

serious danger that brittle fractures would develop in the plating at operating temperatures such at 70° Fahrenheit by reason of the susceptibility of older plates to such fracture when incorporated into such areas of welded plating. This danger was magnified by the difference in thickness between the old and new plating welded together in the *Perama* because notches and welding weaknesses were thereby created.

The repair work done at the Alabama Shipbuilding & Drydock Company yard was completed in January, 1957. The vessel thereafter made a trip to England and then returned in ballast to New Orleans. At New Orleans the vessel was put into Todd's Repair Yard where ten cracks in the vessel's bulkheads were found. The poor state of repair of the vessel was shown by the breakdown which occurred in the steering gear on March 15th and the breakdown of the main propulsion turbine on March 17th. The repair which had been made to the *Perama* by the new owners was apparently a patchwork job which failed to take into account the possibility that brittle fractures would develop from merging plating to the previously riveted hull.

Obviously on the day of the accident cracks developed in the hull of the vessel. The sound of a cracking plate is often taken for an explosion; it has a sound similar to that of an explosion. The cracks developed in places not only surrounding the engine room but also in other places where there was no fire or possibility of fire. Through those cracks poured the sea water which caused the sinking of the vessel. The Court finds as a fact that it is much more likely that the cracks in the hull were caused by brittle fracture in the plates of the hull than that they were caused by an explosion of the fuel oil tank. The Court concludes, therefore, that the respondent has failed to show that the sinking of the vessel was occasioned by fire, or by an explosion caused by fire.

There are two other issues which have been raised and which must be determined:

(1) *Was the suit timely brought?*

It is clear that a carrier is discharged from liability for non-delivery of cargo if suit is not instituted within one year of the date it should have been delivered. 46 U. S. C. § 1303(6). The action here was instituted by filing of the libel on July 19, 1957, four months and one day after the vessel and cargo in suit sank. This was clearly within one year from the date on which the cargo should have been delivered in Italy. The action was brought by the initial libellant herein, Federazione Italiana Dei Consorzi Agrari. The evidence showed that this is a federation of cooperative societies created by Italian legislative decree. Its title can be translated as "Italian Federation of Farm Consortia." The decree establishing it established it as a corporation. The legislative decree grants it full corporate powers. The evidence was that an Italian corporation has power to sue and be sued.

However, the decree establishing this corporation provided in part: "The President or, when he is absent or impeded to attend, the Vice President, is entitled to sue or be sued on behalf of the Company. . . ."

The respondent contends that because the suit was brought in the name of the corporate entity and not in the name of its president or vice president, it was not an effective suit. Several years later the libel was amended to add the President of the Federation as a libellant and to add as further libellants the insurance carriers who had paid the insurance on the lost cargo. Respondent would compute commencement of the action from the time libellant's president was named as a libellant, which would be more than one year after the date when the cargo should have been delivered. Libellant contends that the original

libel was proper and that the Federation had a right to sue in its own name, and that in any event the addition of the president as a libellant relates back to the time of the original libel.

Provisions authorizing specific officers to sue on behalf of the Federation are not restrictions on the capacity of this corporation but are primarily to enable the corporation to comply with the provisions of Italian procedural law designed to insure that an adverse party is informed of the name of the person upon whom papers can be served in any litigation commenced by a corporation. Whatever may be the procedural effect in Italy of this provision of the decree, it is clear that in this country the Federation is a corporate entity and as such has power to sue and be sued. See, *The Liverpool & London Life and Fire Insurance Co.* v. *Oliver*, 10 Wall (77 U. S.) 566 (1870). That the president, or in his absence, the vice president of the Federation authorized the bringing of the suit was established at the trial.

The Court therefore holds that the institution of the action by the filing of the libel on July 19, 1957 was a timely institution of the suit, and that the action is not barred by the provisions of the Carriage of Goods by Sea Act.

The Court, some years later, permitted the Federation's president to be added as a party libellant on the Federation's behalf. If this is the style in which the Federation should have sued, the amendment is merely a correction of the named party entitled to sue and as such relates back to the time of the filing of the libel in any event. See, *Fidelity & Deposit Company of Maryland* v. *Fitzgerald*, 272 F. 2d 121, 129 (10th Cir. 1959).

The Court concludes that the action was timely brought.

(2) *May respondent limit its liability to the value of its interest in the vessel and her freight then pending?*

The fifth affirmative defense of the respondent alleges that respondent is not responsible for any loss or damage that may have been incurred by reason of matters alleged in the libel for any sums in excess of her interest in said vessel and her cargo.

Section 183(a) of Title 46 U. S. C., provides in part that "the liability of the owner of any vessel . . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

The facts as established at the trial indicate that the loss of the cargo was occasioned by the sinking of the ship which in turn was occasioned by the cracking of the ship's plates due to the welding of replacement plates to the old riveted plates. While undoubtedly the respondent, as owner of the vessel, knew about the welding and approved it, there was no proof that the loss of the vessel's cargo was done or occasioned by some default of which the owner was in privity for this would imply that the respondent knew that such welding made the ship unseaworthy. The rehabilitation of the vessel was done for respondent at the Alabama Drydock & Shipbuilding Company where she underwent intensive survey by representatives of the American Bureau of Shipping to determine the repairs necessary to put the vessel back in class with the American Bureau of Shipping. The reconditionng and repairs cost in excess of $890,000. The repairs were supervised by an independent surveyor acting for the respondent; by representatives of the American Bureau of Shipping and by representatives of Alabama Drydock & Shipbuildng Company. Following completion of the work the *Perama* was

accepted in class as being seaworthy by the American Bureau of Shipping.

Libellant also contends that at the time of the sinking the *Perama* did not have a full complement of fully licensed officers. The evidence would indicate that this is probably true. However, the evidence does not indicate that the absence of any such officer in any way contributed to the disaster or the sinking of the ship. Therefore the Court disregards this fact as irrelevant to the main issue of the case.

In retrospect it would seem that the reconstruction of the vessel by welding of the new plates was a mistake. However, it was approved by recognized experts in the shipping industry at the time. The loss of the cargo does not seem to have been a matter which was occasioned by a default of the owner or by a lack of care for which it may personally be charged. There seems to be no reason why it should be unable to avail itself to the limitation of liability provided by Section 183. Therefore the Court concludes that the damages may not exceed the amount or value of the interest of the respondent in such vessel and her freight then pending.

Conclusion.

1. This proceeding was brought within the time limitation of the contract of carriage which incorporates the Carriage of Goods by Sea Act, 46 U. S. C. § 1300, et seq.

2. Respondent is liable for the loss of the cargo owned by libellants.

3. The loss was not caused or contributed to by fire and accordingly the Fire Statute, 46 U. S. C. § 182, and the Fire Exception, 46 U. S. C. § 1304(2)(b) have no application.

4. The respondent corporation can limit its liability under the provisions of 46 U.S.C. § 183, and its liability in the action shall not exceed the amount or value of the interest of the respondent in the *Perama* and her freight then pending.

Submit decree in accordance with the foregoing. The decree should provide for the appointment of a Commissioner to fix the amount of damages. So ordered.

Dated: New York, N. Y.
June 11, 1964

ARCHIE O. DAWSON,
U. S. D. J.

Interlocutory Decree Signed by Judge Dawson

(R. 1688-1690)

The above-entitled cause having come on for final hearing on the pleadings and proofs of the respective parties, and having been briefed and argued by the respective proctors, and the Court, after due deliberation, having handed down its opinion in writing holding that the loss of the cargo of soybean oil referred to in the pleadings was due solely to the cracking of hull plating in SS. *Perama* ~~as the result of the failure of the respondent to exercise due diligence as carrier of said cargo, to make the vessel seaworthy~~ and not as the result of fire or explosion or other cause for which the respondent is not responsible as carrier, and directing a decree for the libellant herein for the damages sustained by the libellants as a result of said loss but not to exceed the amount of the value of the interest of the respondent in the *Perama* and her freight then pending, with costs. S/AOL

Now, on motion of Kirlin, Campbell & Keating, proctors for the libellant herein, it is

ORDERED, ADJUDGED AND DECREED that the libellant recover of and from the respondent, Mandask Compania de Vapores, S. A., the damages sustained in consequence of the sinking of the tankship *Perama* and the total loss of her cargo on March 18, 1957, en route from Baton Rouge, Louisiana, to Genoa, Italy, together with costs, but not to exceed the value of the hull of the SS. *Perama* after her loss if any, and the amount of her freight then pending plus interest at 6% per annum from March 18, 1957, until paid; and it is further

ORDERED that this proceeding is hereby referred to William C. Blind, 120 Broadway, N. Y. as Commissioner, to hear proofs as to the libellant's damages and as to the value of the *Perama* after the loss, if any, and as to the amount of her pending freight and to compute interest thereon and report to this Court his conclusions with all convenient speed.

S/ ARCHIE O. DAWSON,
U. S. D. J.

Dated: New York, New York
June 23, 1964.

Court of Appeals Decision (March 3, 1965)

(R. 1694-1697)

Before:

LUMBARD, *Chief Judge*,
WATERMAN and HAYS, *Circuit Judges*.

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(1) Appeal from an interlocutory decree in admiralty of the United States District Court for the Southern District of New York, Archie O. Dawson, *J.*, holding the respondent shipowner liable for the loss of cargo.

(2) Cross-appeal by the libelants from the same interlocutory decree granting the respondent-shipowner limitation of liability to the value of the interest of the shipowner in the ship and pending freights.

(3) Cross-appeal by the libelants from the denial by Inzer B. Wyatt, *J.*, 223 F. Supp. 206 (1963), of a motion to require the respondent-shipowner to furnish security to the value of the respondent's interest in the ship and pending freights or, in default thereof, to strike the respondent's prayer for limitation of liability.

(1) and (2) Reversed and Remanded.

(3) Affirmed.

HAYS, *Circuit Judge*:

The appeal and cross-appeal in this case arise from the sinking of the Steam Tanker *Perama* on March 18, 1957, in the Gulf of Mexico while on a voyage from Baton Rouge, Louisiana, to Italy. The libellants are the Italian society named, its president, and nineteen Italian underwriters. The society's cargo of soybean oil was lost with the *Perama*. The libellants contended that the sudden insurgence of water through the hull of the *Perama* and its sinking in calm waters about fifteen hours later were caused by the *Perama's* unseaworthy condition. In answer to the libel claiming $5,000,000 in damages, the respondent-shipowner made several affirmative defenses based on clauses of exception in the bill of lading and on the governing provisions of the Carriage of Goods by Sea Act (COGSA).[1]

Under Section 3(1) of COGSA[2] it is the duty of a carrier "to exercise due diligence to . . . make the ship sea-

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[1] 49 Stat. 1207 (1936), 46 U. S. C. §§ 1300-15 (1958).

[2] 49 Stat. 1208 (1936), 46 U. S. C. § 1303(1) (1958):

"(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;"

worthy . . ." Section 4(1) states that "Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier . . ."

In its pleadings the shipowner raised the affirmative defense of due diligence, as well as a defense based on the Fire Statute,[3] and the exception for fire in Section 4(2)(b) of COGSA[4], and these defenses were reflected in the pretrial order. The shipowner had the burden of proof with respect to these affirmative defenses. E.g., *M. W. Zack Metal Co.* v. *S.S. Birmingham City,* 311 F. 2d 334, 337 (2d Cir. 1962), cert. denied, 375 U. S. 816 (1963) (citing cases); Gilmore and Black, The Law of Admiralty 162-63 (1957). See also *The Southwark,* 191 U. S. 1 (1903).

At the trial of this case the evidence presented on the issue of liability was mainly concerned with the respondent's effort to establish the exception of fire. Evidence as to unseaworthiness came into the case only indirectly, and respondent's offer of evidence on the issue of due diligence was rejected by the court. Moreover, in Judge Dawson's opinion there is no discussion of unseaworthiness or of respondent's defense of due diligence and nothing which could properly be considered a finding as to that defense.

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[3] Rev. Stat. § 4282 (1875), 46 U. S. C. § 182 (1958):

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

[4] 49 Stat. 1210 (1936); 46 U. S. C. § 1304(2)(b) (1958):

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * *

(b) Fire, unless caused by the actual fault or privity of the carrier . . ."

In his discussion of limitation of liability Judge Dawson said:

> "The loss of the cargo does not seem to have been a matter which was occasioned by a default of the owner or by a lack of care for which it may personally be charged."

It is difficult to explain how Judge Dawson could have reached this conclusion and yet held the owner liable for the loss, unless he adopted the erroneous view that the owner was, apart from the fire exception, an insurer of the ship's safety and unable to defend on the ground of due diligence. This latter suggestion as to the nature of Judge Dawson's error is supported by the fact that he struck from the interlocutory decree when it was presented to him for signature the statement that the cracking of the hull plating was "the result of the failure of the respondent to exercise due diligence, as carrier of said cargo, to make the vessel seaworthy."

It is possible that the evidence which was held sufficient on the issue of limitation of liability to support a finding that the loss of the cargo was not due to the default or lack of care of the owner was considered insufficient to support such a finding on the issue of liability. See Gilmore and Black, *op cit. supra* at 696-97 and cases cited there, but such a conclusion would, under the circumstances of this case, require an express statement together with some discussion and explanation.

In any event these conjectures as to the reasons for the absence of vital findings cannot be made to do duty for the missing findings themselves.

It is clear that Judge Dawson, preoccupied with the issue of fire, overlooked the fact that due diligence was an available defense to the charge of unseaworthiness. Thus he committed the error of finding that there was liability on

the owner for the loss of the cargo and, at the same time, that the owner was entitled to limitation of liability by reason of due diligence of a character which, it would appear, constituted a complete defense on the issue of liability (33a-34a).

We can perceive no way of correcting the errors and of resolving the inconsistencies except by remand for a new trial.

Libellants also appeal from an order denying their application to compel the respondent to pay over the pending freights or post security. We affirm the district court's determination of this issue on the ground of libellant's delay of more than five years after filing of the answer in making their application.

Except as to this last issue, the orders of the district court are reversed and the case is remanded for a new trial.

Opinion of Judge Croake

(R. 1698-1726)

CROAKE, D. J.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a suit in admiralty brought by the owner of a cargo of soybean oil to recover its value following a total loss sustained when the Panamanian tanker *"Perama"* sank in the Gulf of Mexico on March 18, 1957. The case is here on retrial, having originally been heard by the late Hon. Archie O. Dawson.

At the first trial, Judge Dawson made findings of fact which appear for the most part to be in agreement with our own. These findings were embodied in an opinion dated

June 11, 1964,[1] wherein Judge Dawson found the defendant shipowner liable for the loss of cargo, but also found that it could limit its liability pursuant to § 183(a) of Title 46, United States Code. An interlocutory decree relating to proof and recovery of damages was entered on June 23, 1964, from which an appeal was taken to the United States Court of Appeals for the Second Circuit.

The defendant appealed from the decree as to liability, and the plaintiffs cross-appealed with respect to the issue of limitations.[2] The Court of Appeals reversed as to both issues and remand the case for a new trial.[3]

The retrial, though lengthy and complicated, was well-conducted by experienced attorneys. As at the first trial, a good part of the evidence presented on the issue of liability was concerned with the defendant's effort to establish the exception of fire. In addition, a substantial body of evidence relating to unseaworthiness was presented, both in direct support of the plaintiffs' theory of unseaworthiness, and in opposition to the defendant's theory of fire. Evidence bearing on the issue of due diligence, and on the issues of knowledge and privity, was also presented and carefully considered by the court in arriving at its findings and conclusions.

The court now delivers its opinion and decision, which opinion shall constitute its findings of fact and conclusions of law.

As noted at the first trial, many of the essential facts were stipulated to be not in dispute by a pretrial order filed on August 9, 1963. It is stated a shipment of soybean

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[1] Reported at 1965 A.M.C. 928 (S.D.N.Y. 1964).

[2] The plaintiffs also cross-appealed from a denial of their motion to require the defendant-shipowner to furnish security. The Court of Appeals affirmed as to this issue, and the matter is not before us now.

[3] Reported at 342 F. 2d 215 (2d Cir. 1965) and 1965 A.M.C. 921 (2d Cir. 1965).

oil to be shipped aboard the tank vessel *"Perama"* by the Interoceanic Commodities Corporation, charterer by virtue of a charter party between itself and the owner of the *"Perama"*; that the bill of lading was negotiated by the shipper to the plaintiff; that the tank vessel *"Perama"* was owned and operated by the defendant; that the cargo was loaded aboard the *"Perama"*; that the *"Perama"* departed from Baton Rouge with plaintiff's cargo on board on March 15, 1957; and that on March 18, 1957 the *"Perama"* sank and became a total loss with her cargo.

On these stipulated facts, a prima facie case is established, entitling the plaintiffs to recover unless the defendant can establish a defense provided by law.[4] The defendant's answer to the amended complaint alleges several affirmative defenses based upon the terms of the charter party, and upon certain statutory provisions, all of which shall be taken up below. In addition to its complete defenses, defendant offers the partial defense of limitation of liability.

The several issues calling for resolution can be stated in outline form as follows:

1) Timeliness of suit;
2) Liability;
3) Limitation of liability.

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[4] Under the general prestatutory law as well as under the Harter Act and COGSA, a shipper can make out a prima facie case for recovery by proving loss of goods, or damage to goods, while in the hands of a public carrier. Under recent cases, proof of delivery to the carrier in good order and receipt in bad order or non-receipt places the burden of explanation on the carrier. For a discussion of this topic, see Gilmore & Black, The Law of Admiralty 162-163 (1957) and cases cited therein, especially *American Tobacco Co.* v. *The Katingo Hadjipatera*, 81 F. Supp. 438, 445 (S.D.N.Y. 1948), *aff'd*, 194 F. 2d 449 (2d Cir. 1951), *cert. denied*, 343 U.S. 978 (1952). In the instant case, delivery of the cargo in good order as well as its loss due to the sinking of the "PERAMA" are unquestioned, so that the plaintiffs in this case have made out a prima facie case for recovery.

1. TIMELINESS OF SUIT.

Neither party appealed from the determination of Judge Dawson as to timeliness of suit. His discussion of this issue took into account and resolved the question of corporate capacity to sue, as well as the validity and relation back of an amendment adding the name of the president of the plaintiff Federazione as a party plaintiff. His conclusions appear to be complete and correct. Upon careful consideration, it seems that little purpose could be served by re-formulating them. In the interest of orderly procedure, we expressly adopt and incorporate by reference that portion of the opinion of Judge Dawson dealing with these matters,[5] and concur in his finding that the suit was timely and properly brought.

2. LIABILITY.

The gist of the plaintiffs' position is that the "*Perama*" sank because of the entry of seawater through cracks in her hull which opened as the result of unseaworthiness, and that the defendant is liable for the loss of cargo because of its failure to exercise due diligence to make the ship seaworthy.

The defendant's position may be summarized as follows. It denies that the loss was due to unseaworthiness, and asserts that, at any rate, it exercised due diligence to make the ship seaworthy. In keeping with its denial of loss through unseaworthiness, the defendant urges that the loss was due to one of the statutorily excepted provisions and claims, specifically, that the loss was the result of fire, caused

[5] See 1965 A.M.C. 928 at 936-938.

neither by its actual fault or privity, nor by its design or neglect.[6]

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[6] Among the statutes relating to the asserted positions of the parties is the Carriage of Goods by Sea Act (COGSA), 46 U.S.C., §§ 1300-15, especially the following sections:

"§ 1303. Responsibilities and liabilities of carrier and ship.

(1) Seaworthiness.

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

* * *

"§ 1304. Rights and immunities of carrier and ship.

(1) Unseaworthiness. (Actually denoted as "(a)" instead of "(1)", but the scheme of the statute indicates that "(1)" was intended.)

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, . . . Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

"(2) Uncontrollable causes of loss.

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * *

(b) Fire, unless caused by the actual fault or privity of the carrier.

* * *"

Also relevant is the Fire Statute, 46 U.S.C. § 182:

"§ 182. Loss by fire.

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

As far as the burden of proof is concerned, it has been observed above that the stipulated facts make out a prima facie case for the cargo owner. The carrier, however, has not remained silent. It has properly assumed its burden of explaining the loss and has endeavored to demonstrate to the court that the loss was due to fire, in that the "*Perama*" sank because of a fire-induced explosion.[7] The plaintiffs have countered with proof opposing the defendant's fire theory, attempting to show, both negatively, that the sinking of the ship was not the result of fire, and affirmatively, that it was the result of unseaworthiness caused by want of due diligence.

The facts leading up to the sinking of the "*Perama*" have been established. The "*Perama*" was built in 1936 for the American Oil Company. It was taken out of service and laid up in Jacksonville, Florida, in 1954 in a rusted and deteriorated condition. It was purchased by the defendant in 1956 and towed to the yard of the Alabama Shipbuilding and Dry Dock Company at Mobile, Alabama, for repairs and renewal work.

Upon completion of the repairs, the vessel made a voyage to England to deliver a cargo of gas oil, returning to New Orleans on March 9, 1957. Upon her return she was found to have developed cracks in the renewed portion of the transverse bulkheads in certain of her cargo tanks. Repairs were made at the Todd Shipyard in New Orleans, after which the "*Perama*" proceeded to Baton Rouge, Louisiana, where she loaded the cargo of soybean oil in suit. She sailed from Baton Rouge on March 15, 1957, proceeding down the Mississippi River until forced to

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[7] A successful showing on this point would, under 26 U.S.C. § 182, note 6 *supra*, require exoneration from liability unless it were shown that the fire was caused by the "design or neglect" of the defendant. Similarly, under 46 U.S.C. § 1304(2)(b), note 6 *supra*, the defendant would be entitled to exoneration unless the fire were caused by its "actual fault or privity."

anchor for repairs when her steering gear failed. She got under way again on March 16 and continued down the Mississippi River into the Gulf of Mexico until the afternoon of March 17, when her lubricating oil pump serving the propulsion engines malfunctioned. Despite the resulting loss of oil pressure, the propulsion engines were left running, and were shut down only after several ineffectual attempts to correct the malfunction. Subsequent attempts to repair the lubricating oil pump and restart the engines were unsuccessful. When it became apparent that repairs could not be accomplished at sea, communications with shore were made to arrange for the dispatch of a tug.

At 1:30 a.m., on March 18, a loud noise was heard, and smoke and flame were observed coming from the "*Perama's*" pumproom and from her aft cofferdam. The crew played hoses on the bulkheads of the affected compartments and introduced CO_2 gas into them to smother the fire. The master's log indicated that the fire was out at 2:40 a.m.

At 3:15 a.m., a second loud noise was heard. This second noise was unaccompanied by any flame or flash of light, and with no disturbance of the smoke spirals coming from the compartments as a result of the earlier fire. No new effusion of smoke was observed. After this second noise, which was described by observers as being an explosion, the Chief Mate went down to inspect the cofferdam and pumproom. The engine room had reported that water was pouring in from the bottom near the forward bulkhead. The engineering officers and the Chief Mate testified to seeing a breach on the forward port side of the engine room, and a great quantity of water coming up from the underpart of the engine room. A second crack was also observed in the forward bulkhead of the engine room, with oil and water coming through. In addition, after daylight, the Captain observed cargo oozing from a crack in the deck in the forward part of the ship.

Opinion of Judge Croake

A first attempt by the cargo ship *"Clairborne"* to tow the *"Perama"* failed when the towing lines parted. After the second tow began, the *"Perama"* began to sink rapidly by the stern with the bow going up in the air. The *"Perama"* sank in a calm sea at 4:30 p.m., March 18, 1957. Whether or not the *"Perama"* sank as a result of an excepted cause is the primary fact issue in this case.

Until shortly before sinking, the vessel appeared to be settling on almost an even keel. During the night she settled until her decks amidships were nearly awash. Photographs taken from the Coast Guard aircraft and from the *"Clairborne"* during the efforts to save the ship depict its condition and situation throughout the day.

It is clear from the evidence presented at trial that the cause of the sinking of the *"Perama"* was the flooding of the ship resulting from the entry of sea water through cracks in the hull. The defendant shipowner has attempted to show that the cracks were the result of a fire-caused explosion. Upon careful consideration of all the evidence and the record, including numerous photographic and diagrammatic exhibits, the testimony of experts and eye-witnesses, and a careful review of the transcripts of the testimony, this court finds that the defendant has not satisfied its burden of proof with respect to its attempted demonstration that the loss was due in any part to fire or a fire-induced explosion.

The fire which followed the first loud noise or explosion was not, and is not claimed to be, the immediate cause of the loss. It is the defendant's theory that this fire triggered yet another explosion (the second loud noise) causing the ship to crack and sink.

The evidence of the circumstances aboard ship prior to the alleged explosion does not favor this explosion theory. The testimony of expert witnesses for both parties did not differ appreciably as to the amount of heating that would be necessary to trigger a full tank explosion as ad-

vanced by the defendant. The conditions that would be necessary to provide the kind of heating required for the fuel tank explosions described at trial were simply not available aboard the *"Perama"*.

Expert testimony was heard relating both to the high fuel oil temperatures that would be required for vaporization and ignition, and to the poor heat transfer properties of the pumproom-cofferdam area, where the alleged fire explosions were to have occurred. This testimony combined with the absence of any observations by those aboard ship of the intense heating necessary to establish the conditions favorable to an explosion, all mitigate strongly against the inferences that would need to be drawn to sustain an explosion theory. The fire that had occurred earlier aboard the *"Perama"* was a relatively small and short-lived one, and gave no indication of being anything but out when the second loud noise was heard.

The absence of post-explosive effects after the second loud noise was heard is yet another factor calling for the rejection of the fire explosion theory. This noise was neither accompanied nor followed by any fire or black smoke that would have attended a fuel explosion. Nor was the damage to the ship characteristic of what would be caused by an explosion. There was observed cracking of heavy structures, but no observed explosive damage or destruction to weak structures, such as the deck in the near vicinity of the supposed point of explosion. In addition, the observed even trim of the vessel prior to sinking would not be accounted for by an explosion localized in the vicinity of the pumproom. The pumproom was located in the aft part of the ship, and an explosion occurring there would be followed by entry of seawater in that part alone. In addition, an explosion aft would not explain ruptures in the forward end of the ship that would, by the accompanying entry of water forward, account for the even trim. No satisfactory explanation of the ship's trim, consistent with an explosion theory, has been advanced.

The one factor reconcilable with an explosion theory, of the many considered, is the loud noise itself, heard before the large cracks and leaks were observed. However, even this factor is at best merely consistent with an explosion theory and does not serve to promote the theory over others with which it is at least equally consistent. In particular, testimony as to the intensive explosive noise accompanyng the cracking of a plate the size of a ship's plate provides a ready alternative to the explosion theory as a means of accounting for the loud noise. Moreover, this alternative, unlike the fire-explosion theory, is not at odds with a host of other factors, such as the absence of explosive pre-conditions and after-effects. All the circumstances accompanying the hearing of the loud noise are completely in harmony with the plaintiffs' theory of plate-cracking,[8] and there is no question about the fact that cracking was observed.

In the absence of the necessary pre-conditions for, and the normally ensuing and therefore expected results of, an explosion of the type advanced by the defendant, the presence of a loud noise at best consistent with such an explosion theory is not persuasive. This court finds that the loss of the *"Perama"* and the cargo in suit was in no part the result of any fire or fire-induced explosion.

In the light of this finding, it becomes unnecessary to consider, for purposes of sections 182 and 1304(2)(b), of Title 46 of the United States Code, questions of "design or neglect," or "actual fault or privity" with respect to fire.

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[8] The plaintiffs contend that the loud second noise was the noise created by plate fractures and cracking which occurred as a result of the mehods employed in reconstructing and repairing the *"Perama"*, which failed to remedy and even enhance her susceptibility to brittle features to the extent of leaving her in an unseaworthy condition.

The foregoing conclusions, without more, would call for a judgment for the plaintiffs. The defendant's failure to demonstrate that the loss of the *"Perama"* was due in any part to fire leaves the loss of her cargo unexplained, and the presumption of unseaworthiness in favor of plaintiffs' recovery unrebutted. However, the state of the evidence is such that the court is not compelled to rely solely on this presumption. A portion of the plaintiffs' evidence, introduced primarily to negative the defendant's explosion theory, has affirmative bearing on the issue of unseaworthiness. This evidence relates to unseaworthiness in several respects, namely, the reactivation repairs performed at the Alabama Shipbuilding and Dry Dock Company, the voyage repairs performed at the Todd Shipyard in New Orleans, and the manning of the crew. The defendant's efforts to overcome the force of this evidence have not been successful.

The repair and renewal work at the Alabama Shipyard and Dry Dock Company was performed without proper regard for weaknesses and susceptibility to brittle fracture, and resulted in the creation of crack triggers, notches and discontinuities that increased the likelihood of brittle fracture. In certain instances, excessively wasted plates and internals were not renewed. In addition, new plating was welded to older plating without testing to determine the susceptibility of the older plating to brittle fractures.

At the time of the repair work, the greater susceptibility to cracking of welded structures, as opposed to riveted structures, was well known in the industry. During World War II, experience with welded ships (which had just come into wide use) revealed that metal that had been adequate for use in riveted ships was susceptible to brittle fractures under temperature and stress conditions of relatively low severity when used in welded ships. As a result, steel specifications were developed to minimize susceptibil-

ity to brittle fracture, particularly in welded construction. These specifications were widely known and readily available at the time of the repair work.

Also available, and fairly simple to implement, were means of testing ship's plating for susceptibility to brittle fracture. Nevertheless, the old plates of the *"Perama,"* a pre-war ship built in 1936 with riveted shell and deck plating construction, were not tested for sensitivity to brittle fracture. Weakened by wastage, these pre-war metal plates were incorporated by welding into larger areas of welded new plating.

The welding of the new plates to the old, created crack triggers (also called notches or stress concentrators) cracks increased the likelihood of cracking. Additional crack triggers were created by the process by which rivets were repaired, *i.e.*, by welding new heads on them instead of renewing them. Susceptibility to brittle fracture was further enhanced by the use of certain cropping techniques, which created crack-triggering discontinuities. Finally, no effort was made to adopt measures for preventing the propagation of cracks through the welded configurations, such as, by way of example, the use of crack arrestors.

The failure to adopt measures to prevent crack propagation, while at the same time creating numerous crack triggers in a ship whose hull and internals were in part already excessively wasted and unrenewed, and whose pre-war plating was presumably of pre-war sensitivity and susceptibility to brittle fracture, produced the unseaworthiness that resulted in the eventual sinking and loss of the *"Perama"*.

It would be difficult to disregard the fact that, after the first voyage of the *"Perama"* following her renewal at the Alabama Yard, cracking was observed in the transverse bulkheads of several of her cargo tanks, necessitating repairs at the Todd Shipyard in New Orleans.

The evidence of the unseaworthiness of the *"Perama"* is quite persuasive. Upon consideration, it is apparent that defendant has not only failed to establish the exception of fire through proof of its theory of a fire-induced explosion, but has also failed to impede the plaintiffs' steady progress in carrying the claim of unseaworthiness beyond the area of legal presumption, and into the domain of evidentiary proof. On the basis of all the evidence, this Court finds that the sinking of the *"Perama"* was the result of unseaworthiness of the vessel resulting in the opening of cracks in her hull, and permitting the ingress of water which eventually caused her to sink.

Having found that the loss of the *"Perama"* with its cargo was due to unseaworthiness, attention must now be directed to the defendant's reliance on 46 U.S.C. § 1304(1) providing that liability shall not attach "unless caused by want of due diligence" respecting seaworthiness. The defendant alleges due diligence in performing the repair and renewal work on the *"Perama,"* and attempts to support its allegations by pointing to compliance with recommendations of the American Bureau of Shipping, and subsequent certification by that Bureau. It also relies upon the excellent reputation of the Alabama Shipyard and Dry Dock Company.

The burden of proving due diligence in this regard is, by statute, the defendant's. 46 U. S. C. § 1304(1). The facts to which the defendant refers do not constitute sufficient proof of due diligence. The duty to exercise due diligence respecting seaworthiness is non-delegable and the owner may not avoid its responsibility in this regard by contracting out repair and renewal work. Reliance upon either the American Bureau of Shipping or the Alabama Shipyard and Dry Dock Company does not show that the unseaworthiness of the *"Perama"* was not the result of want of due diligence for which the defendant is responsi-

ble. The opinions or reputations of others do not rule out a want of due diligence. And since the duty to exercise due diligence to provide a seaworthy ship is non-delegable, a want of due diligence on the part of those chosen to effect the repair work is attributable to the owner. The owner has not shown that the repairs themselves were performed with the kind of diligence that would exonerate it from liability for the ensuing unseaworthiness. Without a satisfactory explanation for any of the elements contributing to the unseaworthiness, including the failure to make certain renewals in excessively wasted platings and internals, the method of rivet repair, the use of cropping techniques, the failure to test for crack sensitivity, or the failure to employ proper safeguards against cracking, the defendant cannot under the circumstances of this case claim to have satisfied its burden of proof. Its defense is primarily one of delegated responsibility and must be rejected.

But not only is the defense insufficient at law, it is also unsupported by the facts. The court is satisfied that the continued and active participation [9] in the repair work by corporate representatives, to wit, Mr. Stavraka, a surveyor engaged by the defendant to represent it and to supervise the repair work at the Alabama Shipyard and Dry Dock Co., by Anastassios Sideratos, the defendant's president, and, later, Mr. Kanapaux, the defendant's New Orleans representative, does not square with the attempt to interpose an insulating delegee between the defendant and its liability for unseaworthiness. Having failed in its effort to establish due diligence on the part of either its own representatives or anyone else for whom it must answer, the defendant is liable for the cargo loss resulting from the unseaworthiness of its vessel.

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[9] This participation is described more fully in the discussion of the issue of limitation of liability which follows.

What has been said here concerning the unseaworthiness stemming from the repairs at the Alabama Yard applies equally well to elements of unseaworthiness arising out of the repairs performed at the Todd Shipyard at New Orleans, as well as to unseaworthiness with respect to the manning of the ship. At New Orleans, the repairs made to the discharge line of the main condenser and the inlet pipe of the auxiliary condenser were such as to leave these elements in a weakened condition, and with regard to the inlet pipe, susceptible to cracking and permitting the inrush of water to the engine space. Prior to sailing, two engineering officers left the ship and were not replaced by licensed officers. Apprentice engineers were promoted to fill their place. The inexperience of one of these apprentices can be inferred from his failure to shut down the propulsion turbine after the lube-oil pump malfunctioned.

The relevance of these latter elements of unseaworthiness to the sinking of the *"Perama"* may be somewhat less clear than that of the unseaworthiness resulting from the repair work at the Alabama Shipyard. Nonetheless, they may be regarded at least as contributing causes to the sinking of the *"Perama."* Water was in fact observed rushing into the engineroom, and there is at least substantial probability that efficient and experienced action taken by a competent crew during the salvage operations might have prevented the loss of the ship.

3. Limitation of Liability.

With respect to the question of limitation of liability, it should be pointed out that the defendant has not pressed this issue on retrial. Its briefs make no reference to this partial defense. It might well be deemed to have abandoned this defense. Nevertheless, in so far as the defense is

clearly set forth in the pleaded answer,[10] and in the pretrial order, and the plaintiffs have replied to it in their retrial briefs, the court is constrained to address the issue.

The partial defense of limitation of liability is provided for in 46 U.S.C. § 183. The test for limitation is whether or not the loss occurred "without the privity or knowledge" of the owner of the vessel. Section 183 provides in part:

> "§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; 'seagoing vessel.'
>
> "(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person or any property, goods or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

A finding of liability predicated on a want of due diligence does not necessarily bar a finding that the limitation provided in § 183 should be applied. As indicated by the Court of Appeals, in reversing and remanding this case for

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[10] Although 46 U.S.C. § 185 provides a method for instituting limitation proceedings, such method is not the exclusive way of seeking to limit liability. If suit is brought against the owner, as here, the defense of limitation may be raised in the answer. *The Scotland*, 105 U.S. 24, 33-34 (1882); *Kutger* v. *United States*, 169 F. Supp. 104 (D. Fla. 1958); *Deep Sea Tankers* v. *The Long Branch*, 258 F. 2d 757 (2d Cir. 1958), *cert. denied*, 358 U.S. 933 (1959, *reh. denied*, 359 U.S. 921 (1959); *Odegard* v. *E. Quist, Inc.*, 199 F. Supp. 449 (E.D.N.Y. 1961).

retrial, it may sometimes be the situation that proof held insufficient to exonerate from liability predicated on want of due diligence, is nevertheless sufficient to warrant limitation predicated on lack of privity or knowledge.[11]

The relevant question for purposes of § 183 limitation is whether the owner, in this case a corporation, was without "privity or knowledge." When the owner is a private person, the inquiry into "privity or knowledge" can be made more readily than when the owner is a corporation. In the former situation, there need be no uncertainty as to whose "privity or knowledge" is at issue. In the latter, however, that very uncertainty exists because of the lack of any single individual in whom the fictitious corporate "personality" resides.

In *Coryell* v. *Phipps* (The Seminole), 317 U. S. 406 (1943), the Supreme Court held that the liability of an individual owner would be limited under the facts there present. The Court observed that (p. 412):

> "One who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect in it cannot be denied the benefit of the limitation as respects a loss incurred by an explosion during the period of storage, unless 'privity' or 'knowledge' are to become empty words. If [§ 183] does not give protection to the individual owner in these circumstances, it is difficult to imagine when it would."

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[11] *Federazione Italian* v. *Mandask Compania de Vapores, S. A.*, 342 F. 2d 215 (2d Cir. 1965). The Court said, at p. 217, "It is possible that the evidence which was held sufficient on the issue of limitation of liability to support a finding that the loss of the cargo was not due to the default or lack of care of the owner was considered insufficient to support such a finding on the issue of liability. See Gilmore and Black [The Law of Admiralty] at 696-97 and cases cited there. But such a conclusion would, under the circumstances of this case, require an express statement together with some discussion and explanation."

The Court distinguished the case before it from others where limitation had been denied to corporate owners and explained that (p. 411):

> "A corporation necessarily acts through human beings. The privity of some of those persons must be the privity of the corporation else it could always limit its liability. Hence the search in those cases to see where in the managerial hierarchy the fault lay."

A similar search must be made in the case before this court. In making that search, it is well to bear in mind the Supreme Court's observations as to the thrust of the corporate shipowner cases (p. 410):

> "In those cases it is held that liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred. Spencer Kellogg & Sons v. Hicks, 285 U.S. 502, and cases cited; 3 Benedict, Admiralty (6th ed.) § 490.

The Court also observed that "privity, like knowledge, turns on the facts of particular cases."[12]

In the instant case, the testimony offered at trial reveals that the defendant's representatives, Stavraka and Kanapaux, exercised a large degree of responsibility in the carrying out of the repair work and were well apprised of both the general and detailed nature of the work being carried on. In addition, the defendant's president, Anastassios Sideratos, visited the Alabama Yard and was consulted about details of the work and was kept closely informed by his representatives regarding the nature and progress of the work, both in Alabama, and at New Orleans.

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[12] 317 U.S. at 411.

Under the circumstances of this case and the state of the evidence, this court cannot say that the loss was occasioned by circumstances with respect to which the owner of the "*Perama*" was without knowledge or privity. Having carefully considered all the evidence, it appears that the scope of the authority of all three men was sufficiently broad to categorize them as being high enough in the managerial hierarchy to impute their knowledge and privity to the corporation. Their actual knowledge, awareness and participation in the renewal and repair work, so imputed, is sufficient to bar defendant shipowner from disclaiming knowledge and privity, and calls for a denial of the request for limitation.

Let a decree in conformity with the foregoing findings and conclusions be settled before the undersigned, and on the return date of said notice of settlement the attorneys will be heard on whether provision should be made in said decree for the designation of a Commissioner to determine damages or whether a money judgment should be entered forthwith for damages, if found by the court to be liquidated.

So Ordered.

Thomas F. Croake
Thomas F. Croake
U. S. D. J.

Dated: New York, N. Y.
December 21, 1966

Interlocutory Decree Signed by Judge Croake

(R. 1729-1731)

This action having come on for trial in this Court before The Honorable Thomas F. Croake, United States District Judge for the Southern District of New York and said District Judge having filed his memorandum opinion and findings of fact and conclusions of law in favor of the plaintiffs and directing that the defendant's plea for limitation of liability be denied, it is by the Court

ORDERED, ADJUDGED AND DECREED that the plaintiffs herein recover from the defendant herein their damages by reason of the matters and things alleged in the libel and complaint herein, together with interest and costs; and it is further

ORDERED, ADJUDGED AND DECREED that the plea of defendant herein for limitation of liability be and hereby is denied; and it is further

ORDERED, that this cause be referred to John J. Foley, Esq., 26 Broadway, New York, N. Y., Commissioner, to ascertain and compute the amount of damages of said plaintiffs and to report thereon to this Court with all convenient speed.

Dated: New York, New York
January 25, 1967

s/ THOMAS F. CROAKE,
U.S.D.J.

Court of Appeals Decision (January 16, 1968)

Before:

FRIENDLY, KAUFMAN and ANDERSON,
Circuit Judges.

Appeal from interlocutory decree in admiralty holding defendant-appellant liable for loss of cargo, denying limitation of liability and appointment of commissioner to determine damages, in the United States District Court for the Southern District of New York, Thomas F. Croake, *Judge.* Affirmed except as to order appointing commissioner which is reversed.

ANDERSON, *Circuit Judge*:

This action to recover for the loss of a cargo of soybean oil was originally tried before the late Judge Archie O. Dawson, who entered judgment in favor of the plaintiffs but limited liability.[1] On appeal, this court reversed and remanded because the findings of fact did not make clear apparent inconsistencies between the issue of defendant's due diligence in making the vessel seaworthy and the issue of limitation of liability[2] nor were those two issues discussed in the opinion at all.

At the second trial the shipowner defendant denied unseaworthiness, claimed due diligence in its effort to assure seaworthiness of the vessel when it broke ground to put to sea and claimed that any liability should be limited. In addition, as it did in the first trial the defendant relied principally upon the defense of fire, not caused by the design or neglect of the owner, as provided in the fire statute, 46 U. S. C. § 182, and in the fire exception of the Carriage of Goods by Sea Act (COGSA), 46 U. S. C. § 1304 (2)(b) (1958). Judge Croake concluded that the fire had nothing

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[1] 1965 AMC 982.

[2] 342 F. 2d 215 (2 Cir. 1965).

to do with the loss of the vessel and cargo, that the ship was unseaworthy, that the owner had not shown due diligence in making the ship seaworthy, and he denied limitation of liability.[3] We affirm.

The trial court made detailed findings of fact and it is not necessary to do more than summarize them for the purpose of this opinion. The tank vessel *Perama* was built in 1936 for the American Oil Co. After remaining idle for almost two years in a very run-down condition, she was sold in 1956 to the defendant-appellant, who put her in the yard of the Alabama Drydock and Shipbuilding Company for reconditioning, renewals and repairs, which cost $890,000. After this work had been completed and between January 18, 1957 and March 9, 1957, she carried a cargo of gas oil from Houston, Texas to Thameshaven, England, and returned in ballast to New Orleans, Louisiana. There she went into the Todd Shipyard for repairs, most of which were to remedy some small cracks which had appeared in the transverse bulkheads. The *Perama* then went to Baton Rouge, Louisiana, where she loaded the cargo in suit for carriage to Genoa, Italy. She left Baton Rouge on March 15, 1957 for the Gulf of Mexico. En route she was required to anchor for two hours to repair her steering gear. When out in the Gulf at 1400 on March 17, the *Perama* hove to after shutting down her engines to effect repairs to the lubricating oil pump in her engine room. At about 0130 on March 18th, before the repairs had been fully completed, fire and smoke were observed in the area of the tanker's after pump room and after cofferdam, accompanied by an explosion-like sound. The Captain noted in the log that the fire was put out by 0240, although some smoke still remained. At 0315 a second explosion-like noise occurred, with considerable vibration in the stern of the ship. There were no evidences of fire or smoke conciding with or following this sound, but a diagonal crack, three to four feet long,

[3] 46 U. S. C. § 183.

appeared in the hull in the engine room. The fissure ran down to the floor of the engine room and sea water poured through it and up through the floor plates. A vertical crack of about the same length also appeared in the forward bulkhead of the engine room. This bulkhead was also the after side of the port fuel tank, and through the crack a mixture of water and fuel oil also discharged into the engine room. There was also evidence that sea water was entering through a crack in the pump room. Before leaving the tanker, the *Perama's* Captain observed another crack in the after deck on the starboard hand through which cargo oil was leaking. The court inferred from the trim of the ship until shortly before she sank that cracks had opened up and let in sea water in the forward part of the vessel. In connection with the observed cracks no standard damage control procedures were adopted except for an effort with the pumps to keep ahead of the intake of water, which proved to be ineffective. As sea water flooded the engine room, the Captain ordered the ship abandoned. Distress calls had been sent out by radio, and a vessel which responded, sought to tow the *Perama* to more shoal water for grounding but at 1631 on March 18th the tanker sank in water too deep for salvage of vessel or cargo.

It is not disputed that the cargo was delivered to the carrier in good order and that subsequently it was entirely lost when the ship sank in fair weather and calm seas. Under these circumstances it is presumed that the loss was occasioned by the unseaworthiness of the *Perama*. *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104 (1941); *South, Inc.* v. *Moran Towing and Transportation Co.*, 360 F. 2d. 1002 (2 Cir. 1966); *Lekas & Drivas, Inc.* v. *Goulandris*, 306 F. 2d 426 (2 Cir. 1962). The defendant-appellant could therefore escape liability only by sustaining the burden of proving one of its defenses[4] which were that the facts brought the case within

[4] COGSA, 46 U. S. C. § 1304(1) and § 1304(2q); Gilmore & Black, The Law of Admiralty (1957), §3-43, p. 162.

the fire exception under the COGSA or the provisions of the fire statute, or that it had exercised due diligence to make the *Perama* seaworthy before she broke ground and put to sea, or that it was entitled to limitation of liability.

The fire defense was rejected by both of the trial judges who had heard the case. Both found that the loss of the cargo was not caused by any fire or an explosion resulting from fire. Judge Croake found himself in substantial agreement with Judge Dawson's findings concerning the fire and its effect, though we are concerned on this appeal only with the findings and conclusions of Judge Croake.

The appellant's attacks on the findings are for the most part differing interpretations of the evidence of what those present on the vessel heard and observed and did from the time the engines of the *Perama* were shut down until she sank. This kind of attack resolved itself into a battle of experts who gave sharply conflicting exegeses of the events in the last twenty-seven hours in the life of the vessel. The defendant-appellant argues that a fire of unexplained origin sprang up in the after cofferdam and pump room and heated the fuel oil in adjoining tanks, causing it to vaporize and explode so violently that it opened breaches in the ship's side and let in sea water which sank her. The trial court concluded, however, that the fire did not produce such an explosion. It noted what is a commonly known phenomenon testified to by some of the expert witnesses, that the cracking of steel hull plates or the rending of a steel bulkhead may make a noise like a violent explosion. There was evidence from which the court could have found and did find that the fire was confined to the after cofferdam and pump room; that it did not generate heat of sufficient intensity to vaporize the fuel oil; that the damage to the ship's adjacent internals was not characteristic of that caused by an explosion; that no explosion took place in the fuel tanks; that the flames were subdued in approximately an hour, though the smoke continued a little longer; that

the second explosive noise occurred about a half-hour after the flames of the first fire had been put out; and that no fire or smoke coincided with or followed the second noise, but cracks appeared in the hull of the ship and a bulkhead in the engine room. From these and other facts found from the evidence and stated in its opinion the trial court concluded that the fire did not cause the openings in the ship's hull which let in the sea water. We cannot say that it committed clear error in so doing. The conclusion is fully supported by findings based on competent evidence. The court was not bound to accept the interpretations of the appellant's experts as against those of the appellees. Their function was to aid the court, and it was within the province of the court to accept and use only the explanations and opinions which in its judgment were most logical and consistent with the facts it found. The appellant's claimed fire defense did not avail to meet the presumption in favor of the appellees.

The trial court found that the presumption of unseaworthiness not only remained unrebutted but "that the greater persuasiveness of the plaintiffs' evidence carried "the claim of unseaworthiness beyond the area of legal presumption and into the domain of evidentiary proof." A great deal of time was consumed in the trial and large parts of the briefs submitted on this appeal were devoted to analyses of the chemistry and structure of steel plates used in various parts of the vessel, the susceptibility of the steel plates made during World War II to brittle fractures due to deficiencies of manganese, and to the improved plates used in making the repairs to the *Perama,* although no analysis was offered of the plates used in her when she was built in 1936. There were also conflicting views and opinions of the experts produced by both parties. Those for the plaintiffs sought to prove that the extensive replacement of wasted plates in a riveted ship by welding new plates in substitution for the old, by failing to replace a

large number of wasted plates, by cropping many of the old plates to remove rivet holes at their ends, by welding approximately 13,000 new rivet heads on old stems all tended to create crack triggers which made the hull open up in numerous places and caused the vessel to sink. Those for the defendant sought to show that the new welded plates were of a post-war composition which was not subject to cracking; that the original 1936 steel of her hull was also not susceptible to cracking; that at the time she put to sea the *Perama* had no brittle steel in her; that in the stern where cracks were observed in the engine room and pump room there were no wasted plates, no replacement by welded plates, no welding of new rivet heads and no changes or repairs which could operate as crack triggers; and that the plaintiffs' claim that there were in the hull insufficient crack arrestors is meaningless because the lines of rivets in a riveted ship are in themselves crack arrestors.

The trial court in its opinion discussed the evidence and found facts from which it concluded that the *Perama* was lost because of her unseaworthy condition. There was sufficient evidence to support the findings and the conclusion logically followed. There is certainly no basis for a holding of clear error. The appellant argues that cracks in the hull could come only from brittle steel, that the evidence demonstrated that there was no brittle steel whatever in the *Perama* and that therefore any cracks which appeared could have been caused only by fire and explosion. But the appellant failed to prove that fire and explosion had anything to do with cracking the steel plates and the proposition that, absent some outside force as a procuring cause, no steel plates of pre-World War II riveted ships could crack is, of course, entirely untenable in view of the many cases in which cracks appeared in steel plates in such vessels. The appellant never offered proof of the chemical composition or other intrinsic characteristics of the hull

plates of the *Perama,* but it asserts that the trial court committed reversible error in stating that the tanker's "pre-war plating was presumably of pre-war sensitivity and susceptibility to brittle fracture. . ." This amounts to no more than a criticism of the use of words. For want of a better one the Court mentioned a brittle fracture as distinct from ductile crack, *i.e.,* one resulting from bending or drawing out the steel. There was little or no evidence that the cracks observed were ductile cracks and the court was not wrong in finding, in effect, that they were non-ductile. What such cracks should be called—whether brittle cracks or fractures or ordinary fissures—should not be determinative of this case. Even if the court were wrong in calling them brittle cracks, it would not change the result. The undisputed facts are that after the first voyage cracks appeared in some of the transverse bulkheads and had to be repaired at the Todd Shipyard; on the day of the sinking cracks appeared in the hull and a bulkhead in the engine room and in the hull in the pump room. A crack had also been observed in a deck plate in the after part of the ship.

The essence of the trial court's decision is that the extensive replacement of plates by welding in the hull of a riveted ship, including the replacement of all of the "H" or the "wind and water" strakes, adjacent to cargo spaces, with welded plates, set up stresses within the hull between the fixed and rigid areas of welded plates and the less rigid riveted areas which resulted in cracking in various parts of the hull and the internal structures. Just when and where such stresses in the hull will produce cracks—whether near to or distant from the place of repair—cannot usually be determined, but the substitution of large areas in a riveted hull with welded plates is likely to cause cracks. The court, in effect, found that this is what happened in the present case. The evidence of what was observed to have happened and expert opinion support this conclusion. We find no error in it.

The appellant claims that in any event it cannot be held liable for the loss because it exercised due diligence to make the *Perama* seaworthy.[5] In seeking to fulfill its burden of proof of this defense, it produced evidence to show that it had fully complied with the recommendation of the American Bureau of Shipping to make the vessel seaworthy and that it contracted to have the work done by a reputable shipyard, Alabama Shipyard & Dry Dock Company. The appellees, on the other hand, argue that the sole function of the American Bureau of Shipping was to advise as to the work needed to make the vessel comply with the Bureau's own classification rules and to inspect to see that the work required was performed. The trial court held that the responsibility for exercising due diligence in making the ship seaworthy could not be delegated to others, that the appellant had present, and in charge of the repairs, fully authorized representatives who acted as and for the corporation,[6] that it offered no satisfactory or persuasive explanation for the deficiencies in the repair work which made the ship crack-prone, and that the appellant had

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[5] 46 U. S. C. § 1304(1).

[6] The representatives of the defendant-appellee corporation, who were present at the Alabama Shipyard a substantial part of the time during which the repairs of which they were in charge were being made, were sufficiently high in the managerial hierarchy of the appellant so that their general and detailed knowledge and their close privity to the repair project was imputed to the corporation. Mr. Stavraka, a surveyor, was engaged by the appellant to represent it and supervise the repair work. His testimony disclosed that he had a great range of authority and had a great deal to do with the extent and nature of the repairs made. Mr. Sideratos, the appellant's president, frequently visited the Alabama yard and was constantly consulted and kept fully advised of the plans and how they were being carried out. Plenary authority, similar to that given Mr. Stavraka, was given Mr. Kanapaus, the marine surveyor who represented the appellant for the repairs made at the Todd Shipyard at New Orleans. *Coryell* v. *Phipps*, 317 U. S. 406, 410 (1942).

therefore failed in its burden of proving due diligence. *General Motors Corp.* v. *The Olacho,* 115 F. Supp. 107 (S. D. N. Y. 1953) affirmed on opinion below 220 F. 2d 278 (2 Cir. 1955); Gilmore and Black, The Law of Admiralty (1957) § 3-27, p. 129.

There was evidence that the American Bureau of Shipping in its standards approves and accepts unlimited replacements of the plates in a riveted hull by welded plates. There was also evidence that the United States Coast Guard will approve only minor and very limited substitutions of this kind; and, had the *Perama* been an American flag vessel, the very extensive substitutions of welded for riveted plates made in her repairs would not have been approved by the United States Coast Guard because of the likelihood of the creation of stresses in the hull with resultant cracking of plates. That this method of repair used so extensively in the *Perama* was dangerous was something the appellant knew or should have known. *Great Atlantic & Pacific Tea Co.* v. *Brasileiro,* 159 F. 2d 661, 665 (2 Cir. 1947).

The appellant, in describing the repair work done by the Alabama yard, said that internally the cargo tank bulkheads and framing were almost entirely renewed. After the first voyage, however, cracks appeared in the transverse bulkheads of several of her cargo tanks and had to be repaired at the Todd Shipyard at New Orleans. Although these were small, they should at least have put the appellant on notice that some stress or strain was causing cracks in newly repaired bulkheads which the appellant considered to have been of the highest quality of material and workmanship. But there is nothing to indicate that any special effort was made to investigate or determine the cause of these cracks in the newly installed steel plates. We see no reason to reverse the trial court's conclusion that the appellant failed to sustain its burden of showing due diligence. *Ionian Steamship Co. of Athens* v. *United Distillers,* 236 F. 2d 78, 83-84 (5th Cir. 1956).

The trial court also denied limitation of liability. It found, as above stated, that because of a lack of due diligence on the part of the appellant the *Perama* was sent to sea in an unseaworthy condition. This alone is a sufficient basis for denying limitation of liability. The *Perama* left port in a condition within the basic sense of unseaworthiness as her vulnerability to cracks in her hull exposed her to the grave risk of sinking. The corporate owner's duty to make the vessel seaworthy, at least to the point of providing it with sufficient integrity to meet the ordinary perils of the sea, is not delegable to anyone. Under the circumstances of this case the appellant is held to have knowledge and privity as a matter of law. *States Steamship Company* v. *United States*, 259 F. 2d 458 (9 Cir. 1958); *W. R. Grace & Co.* v. *Charleston Lighterage & Transfer Co.*, 193 F. 2d 539 (4 Cir. 1952); *Gilmore & Black, supra*, § 10-24, pp. 701, 702.

The judgment below in favor of the plaintiffs-appellees, from which the defendant-appellant appealed, is affirmed.

The appellees have cross-appealed from the district court's order referring the case to a commissioner to compute damages. No reason is given in the court's order or in a memorandum to show why the reference was necessary. Inasmuch as exhibits were put in evidence by stipulation showing the sale price of the cargo, the freight for transportation from Baton Rouge to Genoa and the insurance paid by the shipper, there appear to be no exceptional conditions which would call for such a reference. Rule 53(b), F. R. Civ. P. The District Court's order appointing a commissioner to ascertain damages is therefore reversed, and it is directed to enter judgment for $4,623,053.70 with interest at 6% per annum from January 25, 1967 and costs in favor of the appellees and against the appellant.

Denial of Petition for Rehearing (February 20, 1968)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

31131

FEDERAZIONE ITALIANA DEI CONSORZI AGRARI, *et al.*,
Plaintiffs-Appellants,

v.

MANDASK COMPANIA DE VAPORES, S.A.,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant Mandask Compania de Vapores, S.A.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY FRIENDLY,
IRVING R. KAUFMAN,
ROBERT P. ANDERSON,
Circuit Judges.

February 20, 1968

UPREME COURT. U. S.

FILED
JUN [illegible] 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 113

MANDASK COMPANIA DE VAPORES, S.A.,
Petitioner,

against

FEDERAZIONE ITALIANA DEI CONSORZI AGRARI, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WALTER P. HICKEY,
Counsel for Respondent,
120 Broadway,
New York, N. Y. 10005.

EDWARD L. SMITH,
DAVID A. NOURSE,
of Counsel.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Questions Presented	2
Statement of the Case	4
There Are No Reasons for Granting the Writ	7
1. The Court of Appeals' decision is not in conflict with its own prior decisions or those of other circuits or of the English courts	7
2. There is no division on any issue of law among the Judges passing upon the *Perama* trials and appeals	10
3. The defendant shipowner was held liable for failure to exercise diligence respecting seaworthiness and not violation of any Coast Guard regulation	11
4. One of petitioner's many derelictions in the exercise of diligence was properly found to be its failure to test the *Perama's* plating for notch sensitivity	11
5. The decision the petition asks this Court to review does not change the existing law	12
Appendix A	14

Cases Cited

	PAGE
Abbazia, The (S.D.N.Y., 1904), 127 Fed. 495	8
Bank Line v. *Porter* (C.C.A. 4, 1928), 25 F.2d 843, 845; *cert. den.* (1928) 278 U.S. 623	8
Compagnie Maritime Francaise v. *Meyer* (C.C.A. 9, 1918), 248 Fed. 881	8
Esso Providence, The (S.D.N.Y. 1953) 112 F. Supp. 630	10
General Motors Corp. v. *The Olancho* (S.D.N.Y. 1953), 115 F. Supp. 107, *aff'd* (C.A.2, 1955) 220 F.2d 278	8
International Nav. Co. v. *Farr & Bailey Mfg. Co.* (1901) 181 U.S. 218	8
Ionian SS Co. of Athens v. *United Distillers* (C.A.5, 1956), 236 F.2d 78, 83	9
James Griffiths, The (C.C.A. 9, 1936), 84 F.2d 785; *cert. den.* (1937) 299 U.S. 612	8
Otho, The (C.C.A. 2; 1944), 139 F.2d 748, *cert. den.* (1944) 322 U. S. 735	8
Peter Paul, Inc. v. *Rederi A/B Pulp* (*The Christer Salen*) (C.A.2, 1958), 258 F.2d 901	10
Riverstone Meat Co. v. *Lancashire Shipping Co. Ltd.* (*The Muncaster Castle*) (1961) A.C. 807, 1961 A.M.C. 1357	9
Sabine Towing Co. v. *Brennan* (C.C.A. 5, 1934), 72 F.2d 490, *cert. den.* (1934) 293 U.S. 611	8
Schade v. *National Surety Corp.* (C.A.2, 1961), 288 F.2d 106	9

PAGE

Southwark, The (1903) 191 U.S. 1 8

Southwestern Sugar & Molasses Co. v. *Artemis Maritime Co.* (E.D.Va. 1950), 92 F.Supp. 631; *aff'd* (C.A.4, 1951) 189 F.2d 488 9

States SS Co. v. *United States* (C.A.9, 1958), 259 F.2d 458 10

Union of India v. *N. V. Reederij Amsterdam* (1963) 2 Lloyd's List Law Reports 223 9

Windsor Victory, The (E.D.La. 1968), 278 F.Supp. 648 9

Statutes Cited

Carriage of Goods by Sea Act:
Section 4(1) 2, 3, 6, 9, 10

Fire Statute, 46 U.S.C. 183(a) 2, 3, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1450

MANDASK COMPANIA DE VAPORES, S.A.,
Petitioner,

against

FEDERAZIONE ITALIANA DEI CONSORZI AGRARI, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents oppose the granting of a writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, dated January 16, 1968, on the ground that the decision in question was correct and does not involve any question warranting consideration by this Court.

Opinions Below

The statements under the above heading on page 2 of the petition for certiorari are inaccurate and incomplete. The Court of Appeals' opinion on the first appeal did not express the view that the petitioner should have been exonerated but reversed Judge Dawson's decision after the first trial and remanded for a new trial because the findings of fact were insufficient to explain possible inconsistencies between the portions of Judge Dawson's opinion relating to liability and those relating to limitation of liability.

The petition correctly states that the second appeal was heard by a different panel than the first and that that panel denied a petition for rehearing but neglects to point out that the petition for rehearing included a prayer for rehearing *en banc* and that the Chief Judge, Judge Lumbard, who sat on the panel which heard the first appeal, denied the application for rehearing *en banc*. His decision and order dated February 20, 1968, pointing out that no active circuit judge requested that a vote be taken on the suggestion, is annexed to this brief as Appendix A. This unmentioned ruling alone would largely nullify the argument on pages 19 and 20 and elsewhere in the petition that the decision of the panel which heard the first appeal conflicts with that of the panel which heard the second, if the opinions themselves did not dispel the notion. It seems apparent from a reading of the two decisions that there is no conflict and the fact that petitioner's request that an alleged conflict be resolved by the entire court *en banc* was not supported by any of the Judges who decided the first appeal indicates that they did not consider the decisions conflicting.

Questions Presented

The only question involved is the correctness of the decision below that the District Court properly found that the losses in suit were not due to fire or explosion but to unseaworthiness and that the defendant shipowner had not met its statutory burden of proof that the unseaworthiness was not caused or contributed to by its lack of due diligence (a requsite to exoneration pursuant to § 4(1) of the Carriage of Goods by Sea Act, quoted on pages 3 and 4 of the petition) or that it existed without defendant's privity or knowledge (a requsite to limitation of liability pursuant to the Fire Statute, 46 USC 183(a) quoted on page 3 of the petition).

Stripped of argumentative verbiage, the petition asks this Court to review the decisions below to determine whether as a matter of law the fact that after repairs a vessel was classified by the American Bureau of Shipping, a private organization, requires the District Court to find that the repairs constituted due diligence by the shipowner to make her seaworthy despite proof to the contrary. The District Court made findings of fact amply supported by the evidence that the *Perama* was unseaworthy in numerous respects discoverable in the exercise of due diligence which were or should have been known to defendant, and that the loss of cargo in suit was caused by unseaworthiness, not fire or explosion. Evidence was not available which would enable the Court to decide which of the *Perama's* unseaworthy conditions caused the loss, but it did properly decide that defendant had not proven that the cause was not one of the many proven unseaworthy conditions which were not latent and were competent to have caused the loss, and that in the absence of such proof the shipowner was liable without limitation pursuant to 46 USC § 183(a) for the loss of cargo carried pursuant to a contract subject to and incorporating the Carriage of Goods by Sea Act.

Respondents submit that it is so clear and well settled that, under such circumstances, classification by the American Bureau of Shipping does not constitute conclusive proof of the exercise of due diligence or lack of privity in or knowledge of proven unseaworthiness as to make it unnecessary for this Court to consider the question.

The statements in the petition to the effect that the Court of Appeals' decision is in conflict with prior decisions of the same Court or decisions in other circuits or the Courts in England are erroneous, as is the claim that there is any division on any question of law among the eight sitting judges who heard the trials and appeals of this suit respecting the standard of diligence to be applied.

Statement of the Case

The *Perama* was purchased by defendant in 1956, after she had been laid up in a badly wasted condition by American Oil Company, which had operated the vessel since she was built in 1936 (S.M. 1198-9).* Evidence was adduced at the trial and retrial to show that the repairs and renewals made by defendant under the supervision of the American Bureau of Shipping to put the vessel back in class left her crack prone and unseaworthy in the following respects:

First, a large number of the vessel's plates which were wasted in excess of 25% of their thickness and should have been replaced were not renewed (S.M. 1320-1329).

Second, many internal structural components were excessively wasted and were not renewed, creating danger of cracks which could propagate into the hull plating (S.M. 1325-1329).

Third, the defendant elected not to replace the plates it did renew by riveting but by welding. Plaintiffs' experts showed that this method of repair to a riveted ship creates islands of welded plating in the riveted hull, discontinuities in stress distribution and stiff spots likely to result in cracks. It incorporates old plating in such areas which may crack when notched and stressed by welding. Experts testified that the repair method can be employed safely in a riveted ship, if at all, only to a limited extent and if thorough precautions are taken to avoid conditions which in any way accentuate the enhanced danger of crack development. They considered the welded inserts too extensive (S.M. 1008-1113, 1330-1331).

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* References are to pages of the Stenographer's Minutes for the second trial.

The evidence shows that adequate precautions against cracks resulting from the repair method adopted were not taken. There were excessive discrepancies in thickness between new plates and those to which they were welded and none of the old plating was tested to determine whether it was notch sensitive when welded (S.M. 1247, 1330, 1333-1336).

Fourth, the repair method utilized involved the cropping of the old plates to which the renewal plates were to be welded to eliminate rivet holes. This created discontinuities at the ends of strakes of renewal plates and at the juncture of individual renewed plates and old plating to which it was welded, which constituted stress concentrators and potential crack triggers. The adoption of such a repair method required the taking of special complicated precautions against the development of cracks at the ends of strakes as the result of the discontinuities. An indication that such extra precautions were not taken is that cracks can be seen at the ends of renewal plates welded into the deck in photographs taken the morning after the cracks responsible for the *Perama's* loss occurred (S.M. 1408-1410).

Fifth, the defendant elected to repair thousands of loose rivetheads by welding on new heads rather than replacing the rivets. This method is inherently dangerous because of the probability that a crack trigger will result if any of the welding unites the ship's plating with the new rivet head. This almost always occurs when any large number of such repairs is made (S.M. 1331-1332).

Testimony further showed that after completion of the reactivation repairs the *Perama* became unseaworthy in the following additional respects prior to the commencement of the voyage on which she sank:

Sixth, the *Perama's* engine room piping was improperly and inadequately repaired at New Orleans immediately prior to the voyage in suit in a way which may have re-

sulted in its breaking and contributing to the flooding of the vessel's engine room (S.M. 1340-1345).

Seventh, the *Perama* sailed upon the voyage in suit with a shockingly inadequate complement of licensed engineering and deck officers whose incompetence hampered damage control and salvage (S.M. 774-792, 3113, 4118).

The opinions of the trial court and the Court of Appeals show that both courts accepted the evidence of the *Perama's* lack of seaworthiness and her owner's lack of diligence in the respects listed (Petitioner's Appendix A-20-38, A40-49).

The vessel, after loading the cargo in suit, proceeded from Baton Rouge toward Genoa until her engines broke down in the Caribbean. While she was awaiting the arrival of tugs to get her back to port for repairs a fire developed in the pump room and cofferdam after what may have been a bulkhead crack. The fire was extinguished in an hour and ten minutes. Hours later a sound was heard which all courts passing on this case have held was a bottom plating crack and not an explosion. Water started rushing into the vessel in the engine room and cofferdam area and the vessel settled in a manner establishing conclusively that she was also taking water forward. The weather was good, the sea calm. Over twelve hours later she finally sank while salvage efforts were in progress (Petitioner's Appendix, A26-27).

On these facts the District Court and the Court of Appeals properly held that the vessel sank as a result of unseaworthiness; that the owner had not shown as required by Sec. 4(1) of the Carriage of Goods by Sea Act, 46 U.S.C. 1304 (1) that the unseaworthiness did not result from its many failures to exercise due diligence; and that the shipowner had not shown that the loss did not result from causes within the privity or knowledge of the shipowner so as to entitle the owner to limitation under 46 U.S.C. 183(a) (Petitioner's App. A-46-A-49).

There Are No Reasons for Granting the Writ

1. The Court of Appeals' decision is not in conflict with its own prior decisions or those of other circuits or of the English courts.

The petition asserts that proof of the approval of the American Bureau of Shipping of repairs made in a reputable yard before the *Perama* was reactivated entitled petitioner, as a matter of law, to a finding that it exercised due diligence respecting the repairs and was not privy to any of the unseaworthiness traceable thereto. That is not the law and the cases cited in the petition do not so hold. A shipowner may not delegate his duties relating to seaworthiness to any person or organization. The American Bureau of Shipping is a private agency. Its action cannot set standards. Its approval or disapproval of the proposed repairs is based largely upon the findings of individual surveyors (in this case a Mr. Curren) as to their suitability for a particular vessel in the light of its condition. The delicts of that surveyor or anyone else selected by owner to fulfil its duty to exercise diligence operate to preclude owner from utilizing the defense to liability for cargo loss traceable to unseaworthiness set forth in Section 4 of the Carriage of Goods by Sea Act. Moreover, if the management of the shipowner knows or should know of the unseaworthiness it cannot limit liability merely because the Classification Society did not prevent or rectify it.

Petitioner complains in part that it should not have been held liable because too many and too large inserts of welded renewal plating and internals were installed in a riveted ship because the American Bureau of Shipping permitted them even though there is testimony that the Coast Guard would not had the *Perama* flown the U.S. flag. The extent to which it would be proper to utilize welding in repairing a riveted ship depends not only on maximum standards but turns in considerable measure upon the condition of the plating and internals which are not to be

replaced. If these are new and unwasted, larger inserts of welded replacement parts may be safely utilized without causing discontinuities or other dangerous conditions. The American Bureau of Shipping Surveyor, Curren, simply did not investigate areas of plating and internals which previous drillings indicated to be excessively wasted because he was not furnished and did not know about the previous drillings on file with the American Bureau of Shipping and neither he nor the owner's surveyor troubled to find out about them. That lack of diligence alone was sufficient to deny exonoration whatever the maximum limitation on welding in a riveted ship might be.

Contrary to the statements made in the petition there is nothing novel in imposing liability on a shipowner for unseaworthy repairs approved by a classification society or competent surveyors. It has frequently been held that a shipowner cannot escape liability for losses due to discoverable unseaworthiness by attempting to delegate its duties respecting diligence. Some of the cases so holding are:

The Otho (C.C.A.2, 1944), 139 F.2d 748, *cert. den.* (1944) 322 U.S. 735;

General Motors Corp. v. *The Olancho* (S.D.N.Y. 1953), 115 F. Supp. 107, *aff'd* (C.A.2, 1955) 220 F.2d 278;

The Abbazia (S.D.N.Y., 1904), 127 Fed. 495;

Compagnie Maritime Francaise v. *Meyer* (C.C.A. 9, 1918), 248 Fed. 881;

Bank Line v. *Porter* (C.C.A. 4, 1928), 25 F.2d 843, 845; *cert. den.* (1928) 278 U.S. 623;

The Southwark (1903), 191 U.S. 1;

International Nav. Co. v. *Farr & Bailey Mfg. Co.*, (1901) 181 U.S. 218;

The James Griffiths (C.C.A. 9, 1936), 84 F.2d 785; *cert. den.* (1937) 299 U.S. 612;

Sabine Towing Co. v. *Brennan* (C.C.A. 5, 1934), 72 F.2d 490, *cert. den.* (1934) 293 U.S. 611;

Ionian SS Co. of Athens v. *United Distillers* (C.A. 5, 1956), 236 F.2d 78, 83;
Southwestern Sugar & Molasses Co. v. Artemis Maritime Co., (E.D.Va. 1950), 92 F.Supp. 631; *aff'd* (C.A.4, 1951) 189 F.2d 488;
Schade v. *National Surety Corp.*, (C.A. 2, 1961) 288 F.2d 106;
The Windsor Victory (E.D.La. 1968), 278 F.Supp. 648.

The cases relied upon in the petition for the proposition that the owner need only engage competent surveyors and repairers are cases in which the trial court found affirmatively that there was no failure on anyone's part to exercise due diligence respecting seaworthiness and stressed that the proper and customary inspections and work performed by competent organizations constituted some evidence that due diligence had been exercised. Here the trial court has found on ample evidence that unseaworthiness known to or which should have been discovered by the shipowners' management before the vessel sailed caused cargo loss to which the Carriage of Goods by Sea Act is applicable.

There is no conflict between authorities under the Hague Rules and the Brussels Convention of 1924, implemented here by the Carriage of Goods by Sea Act, as to the proposition that if there is a failure to rectify discoverable unseaworthiness prior to the commencement of a voyage having causal relation to a cargo loss, a shipowner is liable for the loss regardless of who is responsible for failing to exercise the requisite diligence. The English law to this effect is set forth in *Riverstone Meat Co.* v. *Lancashire Shipping Co., Ltd.* (*The Muncaster Castle*) (1961) A.C. 807, 1961 A.M.C. 1357. That case is not in conflict with *Union of India* v. *N. V. Reederij Amsterdam*, (1963) 2 Lloyd's List Law Reports 223, as implied in the petition. The latter case is merely another holding that inspection and repair by competent men is some evidence of the

latency of unseaworthiness that subsequently manifests itself and hence that it was not discoverable in the exercise of diligence, and is not a holding that selection of competent surveyors or repairers fulfills a shipowner's duties respecting diligence to make the ship seaworthy.

The difference in result between *Peter Paul, Inc.* v. *Rederi A/B Pulp* (*The Christer Salen*), (C.A.2, 1958) 258 F.2d 901 and *States SS Co.* v. *United States* (C.A.9, 1958), 259 F.2d 458, stems from a difference in findings of fact as to the state of knowledge of the safeguards needed against brittle cracking of plating at the relevant times. Such knowledge is always a factor in determining what constitutes diligence. *The Esso Providence* (S.D. N.Y., 1953) 112 F. Supp. 630. The evidence clearly establishes that when this case arose the dangers of brittle fracture and the need to avoid the conditions built into the PERAMA were widely known. No one, including the American Bureau of Shipping, can authorize a shipowner to subject cargo to such known dangers under the Hague Rules and Brussels Convention embodied in the Carriage of Goods by Sea Act.

2. There is no division on any issue of law among the Judges passing upon the *Perama* trials and appeals.

There is no conflict on any question of law involved in the prior decisions in this case. They turned on findings of fact and their sufficiency. We have already pointed out above in this brief (page 2) that the judges who sat on the first appeal did not elect to re-hear the appeal *en banc* after the second decision, although requested to do so. Apparently they did not see any conflict between the first and the second decisions.

3. The defendant shipowner was held liable for failure to exercise diligence respecting seaworthiness and not violation of any Coast Guard regulation.

Coast Guard inspection practices were discussed only as having a bearing on repair practices in the United States and no Coast Guard regulation was treated as applicable to the *Perama* repairs, *per se*.

4. One of petitioner's many derelictions in the exercise of diligence was properly found to be its failure to test the *Perama's* plating for notch sensitivity.

The material purporting to be the fourth reason for granting the petition, on pages 21-24 misstates the testimony and the findings. The Court accepted testimony by Ganly, MacCutcheon and other experts that the *Perama* was subjected to no force that would cause her to crack if she did not contain brittle notch-sensitive plating and internals. The petition does not seek a review of the clear and well supported findings that there were no explosions to account for the crack-up, nor stresses due to loading or weather conditions that could account for it unless she was brittle. The contention in the petition that the trial court's decision that the *Perama* contained steel which was brittle if notched is unsupported by the evidence and is untrue.

The claim made in the petition that the courts below were not justified in treating the failure to test for notch sensitivity before welding as a lack of diligence is equally baseless. The evidence showed that a test known as the Charpy test would determine conclusively whether the *Perama's* old plating would be notch sensitive and hence brittle when welded, and that the test was well-known, relatively inexpensive and could have been conducted conveniently by using coupons which had to be cut from plating to be welded to replacement plates to eliminate rivet holes.

The evidence that no one could be sure whether or not the *Perama's* plating would be brittle when welded to new plates without subjecting it to a Charpy test was undisputed. The decision to weld long strakes of new plating to old plating under such circumstances without testing the old for notch sensitivity was patently dangerous and a violation of any proper standard of diligence. It is not excused by the fact that the American Bureau of Shipping did not force the owner to test as a condition precedent to approval of the repair.

5. The decision the petition asks this Court to review does not change the existing law.

The basic argument of the petition is that the District Court and the Court of Appeals erred as a matter of law in holding that insertion of relatively large areas of welded replacement plating and internal structures in a previously all-riveted ship without testing the old plating and internals for notch sensitivity constituted part of petitioner's derelictions in diligence because the American Bureau of Shipping permitted them. The propriety of such repair methods often turns on the condition of particular vessels and the feasibility of testing. These questions can be decided only by individual inspectors in the light of their own investigation, which may or may not be diligent. No court has ever held that the American Bureau of Shipping is the final arbiter of diligence. None of the cases relied on in the petition so hold. They do not authorize the adoption of dangerous repair methods or the omission by shipowners of reasonable safeguards against known dangers merely because the ABS has not withheld classifications.

The decision of the case at bar does not change shipowner's liabilities. The owner's liability for cargo losses traceable to unseaworthiness continues to be limited to those cases where a lack of diligence is responsible for the unseaworthiness as before, and the Courts, not the ABS, continue to be the arbiters of what constitutes lack of

diligence. Any difference in the result reached in the case at bar and that reached in earlier cases cited in the petition are due to changes in the knowledge of the shipping world respecting safeguards against hull cracks and not any difference in the legal standards applied. There is no need for this Court to review the decision below to settle or clarify the law.

Respectfully submitted,

WALTER P. HICKEY,
Counsel for Respondent.

EDWARD L. SMITH,
DAVID A. NOURSE,
of Counsel.

June 3, 1968.

APPENDIX A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

FEDERAZIONE ITALIANA DEI CONSORZI AGRARI, et al.,
Plaintiffs-Appellants,

v.

MANDASK COMPANIA DE VAPORES, S.A.,
Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Mandask Compania de Vapores, S.A., and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

February 20, 1968.